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**Supreme Court of the United States**

**OCTOBER TERM, 1950**

**No. 330**

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**AMALGAMATED ASSOCIATION OF STREET,  
ELECTRIC RAILWAY AND MOTOR COACH EM-  
PLOYEES OF AMERICA, DIVISION 998, ET AL.,  
PETITIONERS,**

**vs.**

**WISCONSIN EMPLOYMENT RELATIONS BOARD,  
L. E. GOODING, HENRY RULE, AND J. E. FITZ-  
GIBBON, INDIVIDUALLY, ETC., ET AL.**

---

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF WISCONSIN**

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**PETITION FOR CERTIORARI FILED SEPTEMBER 22, 1950.**

**CERTIORARI GRANTED NOVEMBER 6, 1950.**

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**STATE OF WISCONSIN**

**IN SUPREME COURT**

---

August Term, 1950.

Case No. ....

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**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF  
AMERICA, DIVISION 998, GEORGE KOECHEL and  
CHARLES BREHM, Individually and in Their Repre-  
sentative Capacity, Petitioners-Appellants,**

**vs.**

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.  
GOODING, HENRY RULE and J. E. FITZGIBBON, In-  
dividually and as Members of the Wisconsin Em-  
ployment Relations Board; CARL LUDWIG, H.  
HERMAN RAUCH and MARTIN KLOTSCHKE, Indi-  
vidually and as Members of a Board of Arbitration, and  
THE MILWAUKEE ELECTRIC RAILWAY & TRANS-  
PORT COMPANY, a Wisconsin Corporation,  
Respondents.**

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**APPELLANTS' BRIEF**

**and**

**APPENDIX.**

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**PADWAY, GOLDBERG & PREVIAINT,  
511 Warner Theatre Building,  
212 West Wisconsin Avenue,  
Milwaukee 3, Wisconsin,  
Attorneys for Appellants.**

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 330

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AMALGAMATED ASSOCIATION OF STREET,  
ELECTRIC RAILWAY AND MOTOR COACH EM-  
PLOYEES OF AMERICA, DIVISION 998, ET AL.,  
PETITIONERS,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD,  
L. E. GOODING, HENRY RULE, AND J. E. FITZ-  
GIBBON, INDIVIDUALLY, ETC., ET AL.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF WISCONSIN

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### MEMORANDUM DECISION.

(Venue and title omitted.)

This is an application by the plaintiffs, Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 998, George Koechel and Charles Brehm, individually and in their representative capacity, directed to this Court to review and set aside an Arbitration Order of April 9, 1949, entered by the arbitrators theretofore selected from a panel provided by Wisconsin Employment Relations Board. The facts in this case are not in dispute.

Review is sought pursuant to authority in Chapter 227 and Section 111.60 of the Wisconsin Statutes.

Challenge of unconstitutionality, invalidity and unreasonableness is directed to the entire structure of the arbitration process as provided by the Wisconsin Statutes in situations of this nature involving public utilities and their employees. Objection is raised to the jurisdiction of the State of Wisconsin, through the W. E. R. B., to invoke such arbitration process in this matter, and also to the legality of the award as made herein by the arbitrators.

The defendant The Milwaukee Electric Railway & Transport Company contends that this Court's jurisdiction is limited exclusively to a

1839 consideration of whether the petitioners failed to show (1) that they were denied a reasonable opportunity to be heard, or (2) that the arbitrators exceed their powers, or (3) that the Arbitration Order is not supported by the evidence, or (4) that the Order was procured by fraud, collusion, or other unlawful means. The Transport Company further contends that since there has been no showing by the petitioners of any such items as contemplated by Sec. 111.60 of the Statutes the Court must, as a matter of course, affirm the award.

The petitioners maintain their right to be heard herein on two bases: (1) that an ultimate decision of arbitration proceedings is reviewable under Chapter 227, Wis. Stats. (Wis. Telephone Co. v. W. E. R. B., 253 Wis. 584 at 595); and (2) that Sec. 111.60, Wis. Stats., provides that an award may be reversed on the ground that the arbitrators exceed their powers. As to the latter position, the petitioners maintain that if the arbitration set-up or procedure is invalid, the arbitrators actually have had no authority in the matter, and hence exceeded their authority.

In the opinion of this Court, the stated positions of the petitioners are tenable, and this Court has jurisdiction herein.

Upon review of the record and proceedings herein the Court determines the following:

Sections 111.50 to 111.59 of the Wis. Stats. are not violative of Article I, Section 8, or Article VI of the United States Constitution

(United G. & C. Workers v. W. E. R. B., 255 Wis. 144). The law is not contrary to the 13th Amendment of the Constitution. (Ibid.)

The law is not violative of the 14th Amendment. (Ibid.) No prejudice was shown as to the personnel of arbitrators provided by W. E. R. B. No fraud, collusion, etc., is claimed.

The law is not violative of Article I, Sections 1, 2, 3, 4, 9 or 10 of the Constitution of the State of Wisconsin. (Ibid.)

The law is not violative of Article IV, Section 1, Article V, Section 1, or Article VII, Section 2, of the Wisconsin Constitution relating to executive, legislative and judicial powers (United G. & C. Workers v. W. E. R. B., supra; Pabst Brewing Co. v. W. E. R. B., 252 Wis. 346; Nash Kelvinator Corp. v. W. E. R. B., 247 Wis. 202; Public Service E. Union v. W. E. R. B., 246 Wis. 190).

The law is not violative of Article VII, Section 16, of the Wisconsin Constitution, which provides the conditions under which tribunals of construction and arbitration may operate when established by the Legislature (United G. & C. Workers v. W. E. R. B. supra).

The law is not violative of Article XIII, Section 9, of the Wisconsin Constitution (United G. & C. Workers v. W. E. R. B., supra).

1840

The law is not violative of Chapter 16 of the Wisconsin Statutes. It is within the province of the Legislature to authorize a



different method for the appointment of arbitrators than that provided for other positions.

The Statute is applicable to the company and the employees involved. This is not a railroad, but a street railway enterprise. Railroads are governed by the Federal Railway Labor Act. Section 151.145 of the United States Code, Annotated, provides: ". . . provided, however, that the term 'carrier' shall not include any street, inter-urban or suburban electric railway, unless such railway is operating as a part of a general steam railroad system of transportation." There is nothing in this record indicating that the company operates as part of a general steam railroad system.

The Wisconsin Employment Relations Board did not act in excess of its powers by ordering an arbitration proceeding when an injunction had been issued to prevent a strike. Neither an injunction nor a ban referred to in Section 111.62, Wis. Stats., is a guarantee against interference with an essential service. From the record it is clear that an emergency existed; collective bargaining had broken down; interruption of essential service to the public was threatened. True, the employees were willing to continue to bargain. **The company, apparently, was not willing to do so.** The Legislature has provided a method which was employed by the W. E. R. B. herein, where one of the public's essential services was about to be impaired.

The wisdom of this type of legislation is for the Legislature, not the Courts. In a situation other than one involving a utility, the employees would have been free not to work. By the use of such means they may have compelled the things which they demanded. In this situation, the petitioners, by operation of law, were deprived of such right. This is a legislative and not a judicial matter. It is within the province of the Legislature to enact this kind of law. When the provisions of this kind of law are substantially carried out, the Courts are obliged to sustain the action taken.

The jurisdiction of the Board of Arbitration did not terminate on February 3, 1949. An arbitrator cannot act until he is formally appointed. The time limitation is merely directory, and not mandatory.

The Board of Arbitration did not err with respect to the issues to be decided. Petitioners now contend that there was but one issue, i. e., whether or not the parties should be compelled to go to voluntary arbitration. The record indicates that there were many issues in dispute, all of which were decided by the arbitrators. Under Section 111.57, Wis. Stats., the arbitrators are obliged to render an award upon the issue, or the issues.

In view of the foregoing, the plaintiffs' petition to set aside the award of the Board of Arbitration must be and hereby is respectfully denied.

A suitable order conformable with this memorandum decision shall be presented to this Court for its signature and for filing and service.

Dated at Milwaukee, Wisconsin, this 17th day of February, 1950.

Roland J. Steinle,  
Circuit Judge.

1-3    **Admissions of Service.**

4       **Summons.**

5-15         **PETITION FOR REVIEW.**

(Venue and title omitted.)

The Petitioners above named by Padway, Goldberg & Previant, their attorneys, respectfully pray the Honorable Circuit Court in and for Milwaukee County, Wisconsin, to review and set aside the orders of the Wisconsin Employment Relations Board and a purported Board of Arbitration composed of Respondents, Carl Ludwig, H. Herman Rauch and J. Martin Klotsche, in the proceedings before both Boards entitled

State of Wisconsin.

Before the  
Wisconsin Employment Relations Board.

In the Matter of the Petition of  
Milwaukee Electric Railway  
and Transport Company, a  
Wisconsin Corporation,

For appointment of a Concilia-  
tor to Attempt to Effect  
Settlement of a Labor Dis-  
pute Between

Milwaukee Electric Railway  
and Transport Company, Em-  
ployer,

and the Amalgamated Associa-  
tion of Street, Electric Rail-  
way and Motor Coach Em-  
ployes of America, AFL,  
Union.

Case V  
No. 2579 PU-18.

6 and



Before the  
Arbitration Board

In the Matter of the Arbitra-  
tion of the Dispute Between  
Milwaukee Electric Railway  
and Transport Company, a  
Wisconsin Corporation,  
and °

Case V  
No. 2579 PU-18.

The Amalgamated Association  
of Street, Electric Railway  
and Motor Coach Employes  
of America, A. F. L., Union.

including the Order Appointing Arbitrators  
issued by the Wisconsin Employment Relations  
Board on January 31, 1949, the Order Extending  
the Time within which such Arbitrators could  
act, and the Findings, Decisions and Award of  
the Board of Arbitration filed with the Clerk of  
the Circuit Court of Milwaukee County on April  
11, 1949, and in support of their Petition, your  
Petitioners respectfully show to the Court as  
follows:

I.

That Petitioner, Amalgamated Association of  
Street, Electric Railway and Motor Coach Em-  
ployes of America, Division 998 (hereinafter re-  
ferred to as the "Union"), is a voluntary, unin-  
corporated association of working men, com-  
monly known as a labor union or labor organiza-  
tion situated in the City of Milwaukee, County

of Milwaukee, State of Wisconsin; such association has been organized for the purpose of aiding  
7 its members to become more skillful and efficient workers, the improvement of their wages, hours, and conditions of labor, the protection of their individual rights in the prosecution of their trade, and for such other objects for which working people may lawfully combine, having in view their mutual problems and interests.

## II.

That the petitioner, George Koechel, is the President of the Union, and an employe of the Respondent, The Milwaukee Electric Railway & Transport Company, a Wisconsin corporation, on leave of absence, and brings this action as an officer of said "Union," and as an individual member thereof, and as an employe of the "Company," being first duly authorized so to do.

## III.

That petitioner, Charles Brehm, is an employe of the Respondent, "Transport Company," and a member of the bargaining committee of the petitioner, "Union," and brings this action on his own behalf as well as on behalf of the employes of such "Company" represented by the "Union," being first duly authorized so to do.

## IV.

That the respondent, Wisconsin Employment Relations Board (hereinafter referred to as the "Board"), is an administrative body created by Chapter 57, Laws of 1939.

8

V.

That the respondent, The Milwaukee Electric Railway & Transport Company (hereinafter referred to as the "Company"), is a Wisconsin corporation duly licensed to do business in the State of Wisconsin, having its office and principal place of business at 940 West St. Paul Avenue, in the City and County of Milwaukee, State of Wisconsin, and is engaged in the business of furnishing transportation for hire as a railroad company, and by railway in the City and County of Milwaukee, State of Wisconsin, employing in excess of 2765 employees in the operating and non-operating divisions of its business.



VI.

That substantially all of the employees of the respondent Company other than executive, supervisory, and office personnel have duly designated the petitioner Union as their collective bargaining representative, that such employees have a common and general interest in the subject matter of this action and are too numerous in number to make it practicable for them to join in this petition as individual parties petitioner, and this action is, therefore, brought by the Union and the petitioners, George Koechel and Charles Brehm, as representatives of all of such employees, and for their benefit.

VII.

That on or about the 31st day of December, 1948, the respondent Company petitioned the re-

spondent Board to appoint a Conciliator pursuant to Section 111.54 of the Wisconsin Statutes.

### VIII.

That on the same date said Board ordered that a hearing be held on such petition on January 5, 1949. That on January 5, 1949 petitioners appeared and for the reasons hereinafter more fully set forth moved the Board to dismiss the petition of the Company and to terminate all further proceedings therein; that notwithstanding such objections the Board did on the 5th day of January, 1949 appoint one Nathan P. Feinsinger as a Conciliator pursuant to Section 111.54 of the Statutes.

That your petitioners thereafter participated in the conciliation proceedings subject to all of the objections they had previously made with respect to the validity and constitutionality of the law under which those proceedings were commenced and to the jurisdiction of the Board to appoint such Conciliator.

That on the 19th day of January, 1949 the Board extended the time during which the Conciliator may act until the 29th day of January, 1949.

That as petitioners are informed and believe said Conciliator on the 31st day of January, 1949 reported to the Wisconsin Employment Relations Board that the dispute between the parties continued to exist but such Conciliator did not at such time or at any other time report that in his



opinion the continuation of such dispute would cause or was likely to cause the interruption of an essential service.

IX.

That on the 31st day of January, 1949 the Board made and entered an Order, purportedly pursuant to Section 111.55 of the Statutes, appointing a Panel of Arbitrators from which a Board of Arbitration was to be selected for the purpose of determining said dispute, and directing hearing on such Order on February 3, 1949.

That petitioners appeared at said time and place and protested and renewed their objections to the jurisdiction of the Wisconsin Employment Relations Board and to the validity and the constitutionality of the Statutes under which it was then proceeding.

That at such proceedings on February 3, 1949, respondents, Carl J. Ludwig, J. Martin Klotsche, and H. Herman Rauch were appointed by the Wisconsin Employment Relations Board as a Board of Arbitration to hear and determine said dispute, after the Union (subject to its objections) and the Company had each stricken one name from a Panel of five men submitted to them by the Board.

X.

That thereafter said Board of Arbitration conducted hearings in which petitioners participated, specifically reserving their objections to the constitutionality and validity of the law and

to the jurisdiction and authority of the Board and the Arbitrators, and the Union proceeded subject, and without prejudice, to such objections and under the duress and the coercion of the law.

## XI.

That on ~~the~~ 7th day of March, 1949 the Wisconsin Employment Relations Board extended 11 the time within which the Board of Arbitration could make and enter its decision to and including April 11, 1949. That petitioners objected to the jurisdiction and authority of the Board to enter such order under the Statutes and participated further in the proceedings subject to such objections as well as all other objections previously made.

## XII.

That on April 9th, 1949 the Board of Arbitration served upon petitioners its Decision and Award, and on April 11th, 1949 such Decision and Award was filed with the Clerk of the Circuit Court for Milwaukee County.

## XIII.

That all of the proceedings before the Wisconsin Employment Relations Board, all of the Orders entered by the Wisconsin Employment Relations Board, and the Decision and Award of the Board of Arbitration, and the Statutes under which such Orders, Proceedings, and Decisions were purportedly based are null and void and of no effect whatsoever because they are

(a) Contrary to constitutional rights and privileges;

(b) In excess of the statutory authority or jurisdiction of the Wisconsin Employment Relations Board, and the Board of Arbitration, and affected by other error of law;

(c) Made or promulgated upon an unlawful procedure;

12 (d) Unsupported by substantial evidence in view of the entire record as submitted;

(e) Arbitrary and capricious;

(f) Not supported by the evidence.

#### XIV.

That petitioners incorporate herein by reference the entire record in these proceedings commencing with the Petition for the Appointment of a Conciliator, and including all Motions and Objections and Affidavits made in the course of such proceedings, as well as all of the evidence, Exhibits, documents, and Records before the Board of Arbitration.

Wherefore, Petitioners pray:

1. That the Wisconsin Employment Relations Board be directed to file with the Clerk of the Circuit Court for Milwaukee County, as a part of the record, proceedings and petition in this case, all records, files, motions, affidavits, orders, reports, recommendations and transcripts of testimony in the proceedings before it commencing with the Petition for Appointment of a Conciliator filed by the respondent Company on Decem-

ber 31, 1948, including the proceedings before the Board of Arbitration.

2. That all orders, decisions and awards of the Wisconsin Employment Relations Board and the respondents, Carl J. Ludwig, J. Martin Klotzsch, and H. Herman Rauch, be set aside and held for naught for the reasons and upon the grounds heretofore set forth, and more specifically elaborated on in the motions, affidavits and objections filed by petitioners in the proceedings before the Wisconsin Employment Relations Board and the Board of Arbitration.

Respectfully submitted,

Padway, Goldberg & Previant,  
Attorneys for Petitioners.

14-15 Verifications.

16 Cover.

17-23 Admissions of Service.

24-25

**NOTICE OF APPEARANCE  
and  
STATEMENT OF POSITION.**

**(The Milwaukee Electric Railway & Transport  
Company.)**

(Venue and title omitted.)

Please Take Notice that we are retained by and appear for Respondent, The Milwaukee Electric Railway & Transport Company, in the above-entitled matter; that we demand that a copy of all further papers therein be served upon us at



our office, 773 North Broadway, Milwaukee, Milwaukee County, Wisconsin; and that said Respondent contends in respect of the Arbitration Proceedings referred to in Petitioners' Petition that:

1. The Petitioner was afforded full reasonable and unlimited opportunity to be heard.

2. The Respondent Board of Arbitration, individually and collectively, did not exceed its or their powers.

3. The Decision and Award of said Respondent Board of Arbitration is amply supported by the evidence.

25 4. Said Decision and Award was not procured by fraud, collusion or other unlawful means.

5. The Circuit Court should affirm the Decision and Award filed by said Respondent Board of Arbitration with the Clerk of said court on April 11, 1949.

6. The Circuit Court's jurisdiction in the above-entitled matter is expressly limited by the terms and provisions of Section 111.60 of the Wisconsin Statutes for 1947.

Dated this 4th day of May, 1949.

Shaw, Muskat & Paulsen,  
Attorneys for Respondent, The Milwaukee Electric Railway & Transport Company.

26 Cover.

27-28 Admissions of Service.

**29-30 ANSWER AND STATEMENT OF POSITION  
OF WISCONSIN EMPLOYMENT  
RELATIONS BOARD.**

(Venue and title omitted.)

Now come the respondents, Wisconsin Employment Relations Board, L. E. Gooding, Henry Rule, J. E. Fitzgibbon, Carl Ludwig, H. Herman Rauch and J. Martin Klotzsch, by their attorneys, Thomas E. Fairchild, Attorney General; Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, and for the answer to and statement of position with respect to the petition for review in the above entitled matter, deny and allege:

1. Admit the allegations contained in paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 11 and 12 of said petition for review.

2. Admit that the Milwaukee Electric Railway and Transport Company is a Wisconsin corporation duly licensed to do business in Wisconsin and having its office and principal place of business in the City and County of Milwaukee and that it has 2,765 employees, but deny that it is engaged in the business of furnishing transportation for hire as a railroad company as alleged  
30 in paragraph 5 of said petition for review: with respect to such matters these respondents allege that said Milwaukee Electric Railway and Transport Company is engaged in furnishing public passenger transportation service to the public wholly within Milwaukee County, Wisconsin, by means of motor bus, street car and trackless trolley.

3. Deny the allegations contained in paragraph 13 of said petition for review and deny that any of the orders, decisions or awards of which review is sought are invalid or void on any of the grounds stated in said petition for review or for any other reason, but specifically allege that said orders, decisions and awards are valid and lawful.

4. Allege that these respondents have caused to be filed with the Clerk of Circuit Court for Milwaukee County as a part of the record herein, all its records, files, motions, affidavits, orders, reports, recommendations and transcripts of testimony in the proceedings before said respondent board commencing with the petition for appointment of a conciliator filed by the respondent company on December 31, 1948, including the proceedings before the Board of Arbitration.

Wherefore these respondents pray that the petition for review and setting aside the order, decisions and awards of the Wisconsin Employment Relations Board be dismissed.

Dated May 4, 1949.

Thomas E. Fairchild,  
Attorney General,

Stewart G. Honeck,  
Deputy Attorney General,

Beatrice Lampert,  
Assistant Attorney General,

Attorneys for Wisconsin Employment Relations Board.

31 Cover.

32 Cover—Transcript of Record.

## **PROCEEDINGS**

before

**Wisconsin Employment Relations Board.**

**33-35 Certificate of Wisconsin Employment Relations Board of Transmittal of Record.**

**36-37 PETITION OF MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY FOR APPOINTMENT OF A CONCILIATOR.**

(Venue and title omitted.)

The petition of The Milwaukee Electric Railway & Transport Company, a Wisconsin corporation, represents and shows that:

1. The petitioner, The Milwaukee Electric Railway & Transport Company is a Wisconsin corporation and is a public utility employer within the meaning and purview of Subchapter III of Chapter 111 of the Wisconsin Statutes of 1947.

2. That the petitioner's principal office is located at 940 West St. Paul Avenue, Milwaukee 3, Wisconsin.

3. That the petitioner is primarily engaged in furnishing essential services within the meaning of Section 111.51 of the Wisconsin Statutes for 1947, to-wit, public passenger transportation to

the general public in the City and County of Milwaukee, Wisconsin.

4. That petitioner employs a total of approximately three thousand (3,000) employees.

5. That approximately two thousand seven hundred (2,700) of the operating and maintenance employees of the petitioner constitute a separate, collective bargaining unit and are represented for collective bargaining purposes by a labor organization, to-wit, Division 998 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, hereinafter referred to as the "Union"; that the President of said labor organization is George Koechel, whose business address is Room No. 1406, at 231 West Wisconsin Avenue, Milwaukee 3, Wisconsin.

37 6. That the petitioner and said Union executed a general Labor Agreement on June 11, 1948, and that said agreement expires at midnight, December 31, 1948.

7. That said parties have attempted in good faith to negotiate the terms of a general labor agreement for the year 1949 but have not been able to reach agreement thereon; that said collective bargaining negotiations have reached an impasse and stalemate and that said parties will be unable to effect settlement of said dispute without the intervention, aid and assistance of the conciliation and/or arbitration processes and procedures provided for in Sections 111.50

through 111.65 of the Wisconsin Statutes for 1947.

8. That said petitioner believes that said dispute if not settled will cause or is likely to cause an interruption of said essential public passenger transportation services.

Wherefore, your petitioner requests that pursuant to Section 111.54 of the Wisconsin Statutes for 1947, the Wisconsin Employment Relations Board appoint a Conciliator to expeditiously meet with said parties for the purposes defined in Sections 111.54 and 111.55 of the Wisconsin Statutes for 1947, and that said Wisconsin Employment Relations Board issue its order requiring the maintenance of existing wages, hours and working conditions of employment between said petitioner and said employees pending the proceedings hereinabove requested.

Dated, at Milwaukee, Wisconsin, this 31st day of December, 1948.

The Milwaukee Electric Railway &  
Transport Company,

By R. H. Pinkley,  
President.

38 Verification.

39 Cover.

40-41 **ORDER FOR HEARING ON PETITION  
FOR APPOINTMENT OF CONCILIATOR.**

(Venue and title omitted.)

A petition having been filed with the Wisconsin Employment Relations Board by the Milwaukee Electric Railway and Transport Company, a Wisconsin corporation, alleging that a labor dispute now exists between such employer and the Ainalgamated Association of Street, Electric Railway and Motor Coach Employes of America, affiliated with the American Federation of Labor, which association is the collective bargaining representative for the employes of the employer in the operating and maintenance departments, whose occupations are listed in the wage schedule attached to the General Labor Agreement now in effect between the employer and such union, which agreement is dated June 11, 1948, and expires on December 31, 1948. It is further alleged by the petitioner that the collective bargaining process has reached an impasse and stalemate and that the employer and employes are unable to effect a settlement and requests the Board to appoint a conciliator pursuant to Section 111.54 of the Wisconsin Statutes.

41 The Board being desirous of obtaining information regarding the allegations of the petition to aid it in arriving at an opinion as to whether or not an impasse and stalemate has been reached, and further whether or not such dispute



if not settled will cause, or is likely to cause, the interruption of an essential service;

Now, Therefore, It Is

**Ordered**

That a public hearing on such petition will be held at the Court House in the City of Milwaukee, Wisconsin, on January 5, 1949, commencing at ten o'clock in the forenoon. At that time the Board will consider the petition of the petitioner, a copy of which is attached hereto and made a part hereof. The parties may offer such evidence as they may desire that is material to the question before the Board.

It Is Further Ordered that during the pendency of these proceedings existing wages, hours and conditions of employment shall not be changed by the action of either party without the consent of the other.

Given under our hands and seal at the City of Madison, Wisconsin, this 31st day of December, 1948.

Wisconsin Employment Relations Board,

By L. E. Gooding, /s/

L. E. Gooding, Chairman,

J. E. Fitzgibbon, /s/

J. E. Fitzgibbon, Commissioner,

Henry C. Rule, /s/

(Seal)

Henry C. Rule, Commissioner.

42-48 **MOTION TO DISMISS BY DIVISION 998.**

(Venue and Title Omitted.)

Now comes Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, affiliated with the American Federation of Labor, by Padway, Goldberg & Previant, its attorneys, and upon all the records, pleadings and proceedings herein, and upon the affidavit attached hereto, and moves the Wisconsin Employment Relations Board as Follows:

I.

That the instant Petition of the Milwaukee Electric Railway and Transport Company be dismissed and all further proceedings herein, including the instant one, be terminated forthwith for the following reasons, and upon the following grounds:

Chapter 414, Wisconsin Laws 1947, is unconstitutional, void, and of no effect whatsoever because it is

43 (a) Contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States, in that it is in conflict with the Act of Congress known as the Labor Management Relations Act of 1947, Public Law 101, 80th Congress, June 23, 1947.

(b) Contrary to the provisions of the Thirteenth Amendment to the Constitution of the United States, in that it imposes involuntary servitude upon the Union and its members and those employes represented by the Union in this lawsuit.

(c) Contrary to the Fourteenth Amendment to the Constitution of the United States in that it deprives the Union and its members and those represented by the Union of their liberty and property without due process of law, and of the equal protection of the laws, and deprives the Union and its members of the right to peacefully assemble, express themselves, and to engage in the basic civil right of collective bargaining and self-organization.

(d) Contrary to Article I, Section 10 of the Constitution of the United States, in that it impairs the obligation of contracts.

(e) Contrary to Article I, Sections 1, 2, 3, 4, 9 and 12 of the Constitution of the State of Wisconsin, in that it deprives the Union and its members of the rights therein provided for:

(f) Contrary to Article IV, Section 1, Article V, Section 1, and Article VII, Section 2 of the Constitution of the State of Wisconsin in 44 that it constitutes an unlawful delegation of legislative, executive and judicial powers.

(g) Contrary to Article VII, Section 16 of the Constitution of the State of Wisconsin, in that the Legislature has no authority to establish any tribunals of conciliation with the power to ren-

der judgment obligatory on the part of the parties unless the parties voluntarily submit their matter in difference to arbitration and agree to abide the judgment or assent thereto in writing.

(h) Contrary to Chapter 16, Wisconsin Statutes 1947, in that the parties which have been and may be appointed by the Wisconsin Employment Relations Board to act as Conciliators and Arbitrators under the provisions of Chapter 414, Wisconsin Laws 1947, have been and are so appointed without regard to and in violation of the provisions of said Chapter 16.

(i) Contrary to Article XIII, Section 9 of the Constitution of the State of Wisconsin.

## II.

In the event of denial of the above motion, and only in that event, and without waiver of or prejudice to said motion, then Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the instant Petition of the Milwaukee  
45 Electric Railway and Transport Company be  
dismissed, and all further proceedings, including  
the instant one, be terminated forthwith for the  
reason that the Milwaukee Electric Railway and  
Transport Company is a railroad and the em-  
ployes involved herein are railroad employes,  
and are, therefore, exempted from the provisions

of Chapter 414, Wisconsin Laws 1947, particularly Section 111.51 (1) thereof.

### III.

In the event of denial of the above motions, and each of them, and only in that event, and without waiver of or prejudice to said motions, then Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the instant Petition of the Milwaukee Electric Railway and Transport Company be dismissed and all further proceedings, including the instant one, be terminated forthwith until such time as those persons who are named on the Panel of Conciliators and Arbitrators appointed by the Board submit to and successfully pass appropriate Civil Service Examinations which will demonstrate not only their qualifications and abilities to act as Conciliators and Arbitrators under such law, but also legally qualify them to receive taxpayers' money as alleged compensation for their purported services.

### IV.

In the event of denial of the above motions,  
46 and each of them, and only in that event, and without waiver of or prejudice to said motions, then Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Em-

ployees of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the instant Petition of the Milwaukee Electric Railway and Transport Company be dismissed and all further proceedings, including the instant one, be terminated forthwith for the reason that there is "no impasse and stalemate" in "the collective bargaining process, notwithstanding good faith efforts on the part of both sides to said dispute," in that Petitioner has not bargained in good faith, and has failed and refused to consent to arbitrate in accordance with the terms of previous agreements which have been in effect between the parties, and which have always been adequate for the settlement of the differences between the parties, and have failed and refused to accept present and outstanding offers by Division 998 to so arbitrate and settle their differences.

V.

In the event of denial of the above motions, and each of them, and only in that event, and without waiver of or prejudice to said motion, then Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the instant Petition of the Milwaukee Electric Railway and Transport Company be

47 dismissed and all further proceedings, including the instant one, be terminated forthwith for the reason that if there is an "impasse and stalemate" it is solely of Petitioner's creation, and, therefore, the money of the taxpayers of the State of Wisconsin should not be appropriated and spent at the request of the Petitioner and upon its Petition.

## VI.

In the event of denial of the above motions, and each of them, and only in that event, and without waiver of or prejudice to said motion, then Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the instant Petition of the Milwaukee Electric Railway and Transport Company be dismissed and all further proceedings, including the instant one, be terminated forthwith for the reason that since December 13, 1948, Representatives of the Federal Mediation and Conciliation Service of the United States Government have been and still are seeking to settle the instant controversy, and the appointment of a Conciliator, therefore, by the Wisconsin Employment Relations Board would not only result in a duplication of effort and confusion and conflict, but will also result in interference with the operation of Federal Laws and Agencies, contrary to the provisions of Article I, Section 8, and

2



Article VI of the Constitution of the United States.

48 Respectfully submitted,

Padway, Goldberg & Préviant,  
Attorneys for Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Affiliated with the American Federation of Labor.

49-54 **AFFIDAVIT IN SUPPORT OF MOTION.**

(Venue and title omitted.)

State of Wisconsin }  
Milwaukee County } ss.

George Koechel, being first duly sworn, on oath deposes and says that he is President of Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, affiliated with the American Federation of Labor (hereinafter referred to as the Union), and he makes this affidavit on behalf of such organization and the members thereof, being first duly authorized so to do;

That Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, A. F. L., is a voluntary, unincorporated association of working men,  
50 commonly known as a labor union or labor organization situated in the City of Milwaukee,

County of Milwaukee, State of Wisconsin, and that such association has been organized for the purpose of aiding its members to become more skillful and efficient workers, the improvement of their wages, hours and conditions of labor, and the protection of their individual rights in the prosecution of their trade, and for such other objects for which working people may lawfully combine, having in view their mutual problems and interests; that substantially all of the employees of the Milwaukee Electric Railway and Transport Company (hereinafter referred to as the Company), other than executive, supervisory and office personnel, have duly designated the union as their collective bargaining representative; that as the exclusive bargaining representative of such employees the union has entered into agreements with the Company for many years last past, the last of such agreements having been cancelled and terminated by action of the Company on December 31, 1948;

That the Milwaukee Electric Railway and Transport Company is a Wisconsin corporation which provides, furnishes and sells transportation services to and for residents of the City of Milwaukee and contiguous suburbs and political subdivisions, including thousands of employees of many large industrial and commercial establishments in the City and County of Milwaukee, State of Wisconsin, most of which establishments are engaged in the production of goods for interstate commerce or in interstate commerce, and the services of which employees are essential to

such production of goods for interstate commerce; that the rolling stock equipment and material used by the company are procured in great measure by it from many and diverse points outside the State of Wisconsin, the total value of the rolling stock recently acquired by the company from such points outside the State of Wisconsin, being in excess of the amount of Two Million Dollars (\$2,000,000.00); that the gross operating revenues of the company are in excess of Sixteen Million Dollars (\$16,000,000.00) annually, and that it transports in excess of one million (1,000,000) passengers annually;

That the National Labor Relations Board in December, 1947, pursuant to the terms and provisions of the National Labor Relations Act, and upon the insistence of the Company that the terms of such act be complied with, assumed jurisdiction over a controversy respecting the signing of a union security agreement under the provisions of the National Labor Relations Act, conducted an election among the employees of the Company represented by the Union, and certified that the Union had successfully complied with all of the provisions of the National Labor Relations Act, and could enter into a union security agreement with the Company;

That the Company is engaged in a business affecting interstate commerce and in interstate commerce, and any interruption in its business as the result of a labor dispute with its employees would affect interstate commerce within the

meaning and provisions of the National Labor Relations Act (49 Stats. 449, U. S. Code, Title 29, Paragraph 151-166);

- 52 That in the year 1934 the employees of the Company represented by the Union engaged in a strike growing out of the refusal of the Company to recognize the Union as the exclusive collective bargaining representative of its employees; that upon the termination of such strike the Company and the Union agreed upon a method for the settlement of all future disputes, which method has resulted in fourteen years of uninterrupted service to the public, and which method has always been considered by both parties as adequate for the resolution of all differences which might arise between them; that such method consisted of an agreement between the parties that should any dispute arise during the term of the collective bargaining agreement or over the terms of a new collective bargaining agreement, then such dispute shall be submitted to final and binding arbitration before a tribunal created by mutual consent and choice of both parties; that the Union always has been, and still is, willing to settle the instant controversy with respect to the terms of a new collective bargaining agreement in this manner, just as a similar dispute was settled in connection with the terms and provisions of the 1948 agreement; that it was the unilateral and exclusive action of the Company which resulted in the termination of the 1948 agreement, including that part of such agreement which, if not terminated, would have

required the parties to arbitrate their differences. °  
in the manner aforesaid;

That prior to December 31, 1948, the Union submitted to the Company an offer to arbitrate the instant dispute in the following manner: Each party to appoint an arbitrator, the two such  
53 arbitrators to meet daily for the purpose of agreeing upon a third member of such Arbitration Board; that in the event the arbitrators appointed by the parties should be unable after fifteen daily meetings to agree upon such third member of the Board, then the parties are to request the Federal Department of Conciliation and Mediation to submit to the parties a list of five proposed arbitrators, each party to alternately strike two names from such list, and the person whose name remains to then be the third member of such Board; that the Company has refused to accept and agree to such method and settlement of the dispute, stating that it was committed, by agreement with all other public utility employers in the State of Wisconsin, to refuse such method of arbitration;

That on Tuesday, January 4, 1949, after the members of the Union had overwhelmingly rejected by secret ballot referendum the last proposal made by the Company, the Union renewed its offer to arbitrate the dispute in the manner aforesaid, and that the company has again refused to accept such method of settlement;

That since December 13, 1948, at the request of the Union, the Milwaukee resident conciliator

of the Federal Conciliation and Mediation Service has offered his services and rendered his services in an effort to settle the instant dispute, and that such conciliator has not yet withdrawn from the case;

That affiant believes the instant controversy need not be submitted to the procedures established by Chapter 414, Wisconsin Laws, 1947, if such Chapter of the Wisconsin Laws be a valid one, in view of the present efforts of the representative of the Federal Mediation and Conciliation Service, and in view of the offers made by the Union to submit the matters in dispute to an arbitration tribunal created by the parties, the expenses of which are to be borne equally by the parties; that this affidavit is made in support of the motions attached hereto and in answer to the Petition of the Milwaukee Electric Railway and Transport Company.

George Koechel.

Subscribed and sworn to before me this 4th day of January, 1949.

David Previant,  
Notary Public, Milwaukee County,  
Wisconsin.

My Commission expires May 7, 1950.



**56-83 HEARING ON PETITION FOR APPOINTMENT OF A CONCILIATOR.**

**57-62 Preliminary Discussion and Argument.**

**63 Mr. Gooding, Chairman of the Wisconsin Employment Relations Board, made the following answers to questions put to him by Counsel for Division 998:**

None of the persons named on the Panel of Conciliators and Arbitrators appointed by the Board have qualified under Chapter 16 of the Wisconsin Statutes for their position. Neither the Director of Personnel nor the Bureau of Personnel have certified these individuals as qualified under Chapter 16 to the performance they are assigned to. Their names have not been reported by the Board to the Bureau of Personnel. They have taken the oath of office prescribed by the Constitution of the State of Wisconsin, Article IV, Section 28, and by Section 19.01 of the Statutes. The oath is on file in the Secretary of State's office. It is the same oath I took when I signed.

**64-70 Motion and Affidavit appearing at Record pages 42 to 54 read into Record.**

**71-78 Argument on Motion.**

**79 Mr. Gooding: Motion No. 1 was almost wholly disposed of by a decision of the Circuit Court in the Declaratory Relief case.**

Motion No. 2 was similarly disposed of.

With reference to No. 3 we are satisfied that the Civil Service Section of the Statute does not apply to these Conciliators and Arbitrators.



80. With respect to Motion No. 4, we are satisfied that there is an impasse here.

The same statement may be made with reference to Motion No. 5.

With reference to Motion No. 6, we think it is wholly immaterial whether the representatives of the Federal Mediation and Conciliation Service have been attempting to conciliate this dispute or whether anybody else has been attempting to conciliate this dispute.

- 82 Professor Nathan Feinsinger is designated as the Conciliator which will attempt to arrange meetings between the Company and the Union.

Mr. Previat: Without waiver of our position, we shall extend to Professor Feinsinger all the courtesies.

- 83 Further discussion between the parties.

- 84 Certificate of Official Reporter.

85-86 **ORDER APPOINTING CONCILIATOR.**

(Venue and title omitted.)

The Milwaukee Electric Railway and Transport Company filed with the Wisconsin Employment Relations Board a petition pursuant to Section 111.54 of the Wis. Stats. setting forth that a labor dispute now exists between the petitioner, an employer, and the Amalgamated

Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, and that such Association is the collective bargaining representative for the employees of the petitioner in its Operating and Maintenance Departments. The petitioner further alleged that the collective bargaining process has reached an impasse and stalemate and that the employer and employees are unable to effect a settlement of such dispute and requested the Board to appoint a conciliator pursuant to Section 111.54 of the Wis. Stats.

After notice to the parties and after hearing arguments of counsel and receiving testimony the Board has considered the petition, the testimony and arguments of counsel, and in the opinion of the Board the collective bargaining process, notwithstanding good faith efforts on the part of both sides to the dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service.

86 Now, Therefore, it is

#### ORDERED

That Nathan W. Feinsinger, a member of the panel of conciliators and arbitrators appointed pursuant to Section 111.53 of the Wis. Stats., is hereby named and designated as conciliator and directed to attempt to effect a settlement of the dispute now existing between the parties.

It Is Further Ordered that said conciliator expeditiously meet with the parties, exert every reasonable effort to effect a prompt settlement of the dispute, and if unable to effect a settlement within fifteen days from the date of his appointment report such fact to the Board, including in his report a statement of all issues still in dispute between the parties.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of January, 1949.

Wisconsin Employment Relations  
Board,

(Seal)

By L. E. Gooding, /s/

L. E. Gooding, Chairman

J. E. Fitzgibbon /s/

J. E. Fitzgibbon, Commissioner

Henry C. Rule /s/

Henry C. Rule, Commissioner.

87-88

**ORDER EXTENDING TIME OF  
CONCILIATOR.**

(Venue and Title Omitted.)

Nathan P. Feinsinger having heretofore and on the 5th day of January, 1949, been appointed by the Wisconsin Employment Relations Board pursuant to Section 111.54 of the Wisconsin Statutes as Conciliator to attempt to conciliate the dispute existing between the Milwaukee Electric Railway and Transport Company and the Amalgamated

Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, and to file a report within fifteen days from such date as to what progress had been made in the settlement of the dispute, and said Nathan P. Feinsinger having orally reported to the Board that he had been unable to effect a settlement but that the parties were still in negotiations under his direction, and that there was a possibility that if the negotiations were continued the dispute might be settled, and that such dispute is not likely to cause the interruption of an essential service at the present time, and it appearing to the Board from such report that further efforts should be made to conciliate the dispute;

Now, Therefore, it is

**Ordered**

- 88 That the time within which said Nathan P. Feinsinger as Conciliator report to the Board be, and the same hereby is extended to the 29th day of January, 1949.

It Is Further Ordered that said Nathan P. Feinsinger continue his efforts to effect settlement of the dispute now existing between such employer and its employes, and that if he is unable to effect a settlement of such dispute by the 29th of January, 1949, he report such fact to the Board, including in his statement a full statement of the issues remaining in dispute.

Given under our hands and seal at the City of  
Madison, Wisconsin, this 19th day of January,  
1949.

Wisconsin Employment Relations  
Board

(Seal) / By L. E. Gooding, /s/  
L. E. Gooding, Chairman  
J. E. Fitzgibbon /s/  
J. E. Fitzgibbon, Commissioner  
Henry C. Rule /s/  
Henry C. Rule, Commissioner

89-90

**FINAL REPORT OF CONCILIATOR.**

(Venue and title omitted.)

The undersigned was appointed as Conciliator on Wednesday, January 5, 1949, with instructions to report within 15 days. On January 19, 1949, the time was extended an additional 10 days, to January 29, 1949.

This dispute arose over the failure of the parties to agree on a new contract to succeed the previous contract which had been cancelled by the Company pursuant to proper notice, effective midnight, last December 31. On January 5, a work stoppage occurred. The Conciliator first directed his efforts towards securing a resumption of service. Service was resumed in full the following morning.

The conciliator met with the parties jointly, separately, or both, on the following days: January 6, 7, 12, 13, 19, 22, 27.

At the opening of the first conciliation meeting, the Union read a prepared statement in which it reserved certain legal objections as set forth in the proceedings before the Board on Wednesday, January 5, 1949.

The issues remaining in dispute at the opening of the conciliation sessions were as follows:

1. The amount of a general wage increase.
2. Reduction of the present 44-hour guarantee, and conversion of the reduction into an additional wage increase.
3. Holiday pay.
4. Modification or elimination of the provisions of the old contract relating to arbitration of disputes concerning the interpretation or renewal of agreements.

90 It will serve no useful purpose to provide further detail or recite the history of conciliation, since no doubt the Union will now revert to its original 40 demands and the Company to its original proposal.

At the final meeting (Thursday, January 27) the Conciliator proposes a formula for final settlement (a) on the merits (b) by a specified procedure. The parties were to notify the Conciliator by noon of Saturday, January 29, of their position. It was agreed that the contents of the proposal would not be disclosed unless both sides accepted. The proposal was not accepted. The Conciliator must therefore report that he has

been unable to effectuate a settlement of this dispute within the time allotted.

Respectfully submitted,

Nathan P. Feinsinger.

January 29, 1949.

91-92      **ORDER APPOINTING ARBITRATORS.**

(Venue and title omitted.)

The Wisconsin Employment Relations Board, having heretofore and on the 19th day of January, 1949, pursuant to a petition filed by the Milwaukee Electric Railway and Transport Company, a corporation, appointed Nathan P. Feinsinger of the City of Madison as conciliator, pursuant to Section 111.54 of the Wisconsin Statutes, for the purpose of attempting to settle a dispute existing between the employes of the Milwaukee Electric Railway and Transport Company, represented by the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, A. F. L., and the petitioning company; and said Nathan P. Feinsinger having on the 31st day of January, 1949, reported to the Board that the dispute between the parties continues to exist, and from such report it appearing that a continuation of the dispute will cause, or is likely to cause, the interruption of an essential service;

Now, Therefore, it is

**Ordered.**

That pursuant to Section 111.55 of the Wisconsin Statutes, the following named persons, all



of whom have qualified as arbitrators under the provisions of Section 111.53 of the Wisconsin Statutes, be submitted to the parties as the persons from which the Board of Arbitration to determine said dispute, shall be selected, to-wit: John Ernest Roe, Madison, Wisconsin, J. Martin Klotsche, Milwaukee, Wisconsin, Carl J. Ludwig, Milwaukee, Wisconsin, H. Herman Rauch, Milwaukee, Wisconsin, and Francis X. Swietlik, Milwaukee, Wisconsin.

It Is Further Ordered that the representatives of the Milwaukee Electric Railway and Transport Company and the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, A. F. L., meet at the Milwaukee County Court House, Milwaukee, Wisconsin, on Thursday, February 3rd, 1949, at 3:00 o'clock in the afternoon, at which time each party may strike the name of one person from the list of the names above submitted. The remaining three persons will constitute the Board of Arbitration to which board will be submitted the issues in dispute between the parties.

Given under our hands and seal at the City of Madison, Wisconsin, this 31st day of January, 1949.

Wisconsin Employment Relations Board,

By L. E. Gooding, /s/

L. E. Gooding, Chairman,

J. E. Fitzgibbon, /s/

J. E. Fitzgibbon, Commissioner,

Henry C. Rule, /s/

Henry C. Rule, Commissioner.

93-99     **MOTION TO DISMISS ARBITRATION  
PROCEEDINGS.**

(Venue and title omitted.)

Now comes Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, affiliated with the American Federation of Labor, by Padway, Goldberg & Previant, its attorneys, and upon all the records, pleadings and proceedings herein, and upon the affidavit attached hereto, and moves the Wisconsin Employment Relations Board as follows:

I.

That the Order Appointing Arbitrators issued by the Wisconsin Employment Relations Board on January 31, 1949, be vacated and set aside and that all further proceedings herein, including the instant one, be terminated forthwith for the following reasons, and upon the following grounds:

Chapter 414, Wisconsin Laws 1947, is unconstitutional, void, and of no effect whatsoever because it is

(a) Contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States, in that it is in conflict with the Act of Congress known as the Labor Management Relations Act of 1947, Public Law 101, 80th Congress, June 23, 1947.

(b) Contrary to the provisions of the Thirteenth Amendment to the Constitution of the United States, in that it imposes involuntary servitude upon the Union and its members and those employees represented by the Union in this lawsuit.

(c) Contrary to the Fourteenth Amendment to the Constitution of the United States in that it deprives the Union and its members and those represented by the Union of their liberty and property without due process of law, and of the equal protection of the laws, and deprives the Union and its members of the right to peacefully assemble, express themselves, and to engage in the basic civil right of collective bargaining and self-organization.

(d) Contrary to Article I, Section 10 of the Constitution of the United States in that it impairs the obligation of contracts.

(e) Contrary to Article I, Sections 1, 2, 3, 4, 9 and 12 of the Constitution of the State of Wisconsin, in that it deprives the Union and its members of the rights therein provided for.

(f) Contrary to Article IV, Section 1, Article V, Section 1, and Article VII, Section 2, of the Constitution of the State of Wisconsin, in that it constitutes an unlawful delegation of legislative, executive and judicial powers.

(g) Contrary to Article VII, Section 16 of the Constitution of the State of Wisconsin, in that the Legislature has no authority to establish

any tribunals of conciliation with the power to render judgment obligatory on the part of the parties unless the parties voluntarily submit their matter in difference to arbitration and agree to abide the judgment or assent thereto in writing.

(b) Contrary to Chapter 16, Wisconsin Statutes, 1947, in that the parties which have been and may be appointed by the Wisconsin Employment Relations Board to act as Conciliators and Arbitrators under the provisions of Chapter 414, Wisconsin Laws, 1947, have been and are so appointed without regard to and in violation of the provisions of said Chapter 16.

(i) Contrary to Article XIII, Section 9 of the Constitution of the State of Wisconsin.

## II.

In the event of denial of the above motion and only in that event, and without waiver of or  
96 prejudice to said motion, then Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the Order Appointing Arbitrators issued by the Wisconsin Employment Relations Board on January 31, 1949, be vacated and set aside, and that all further proceedings herein, including the instant one, be terminated forthwith for the reason that the Milwaukee Electric Railway

employees involved herein are railroad employees, and are, therefore, exempted from the provisions of Chapter 414, Wisconsin Laws, 1947, particularly Section 111.51 (1) thereof.

### III.

In the event of denial of the above motions, and each of them, and only in that event, and without waiver of or prejudice to said motions, then Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the Order Appointing Arbitrators issued by the Wisconsin Employment Relations Board on January 31, 1949, be vacated and set aside, and that all further proceedings herein, including the instant one, be terminated forthwith until such time as those persons who are named on the Panel of Arbitrators appointed by the  
97 Board submit to and successfully pass appropriate Civil Service Examinations which will demonstrate not only their qualifications and abilities to act as Conciliators and Arbitrators under such law, but also legally qualify them to receive taxpayers' money as alleged compensation for their purported services.

### IV.

In the event of denial of the above motions, and each of them, and only in that event, and

without waiver of or prejudice to said motions, then Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the Order Appointing Arbitrators issued by the Wisconsin Employment Relations Board on January 31, 1949, be vacated and set aside, and that all further proceedings herein, including the instant one, be terminated forthwith for the reason that there is "no impasse and stalemate" in "the collective bargaining process, notwithstanding good faith efforts on the part of both sides to said dispute" in that the Milwaukee Electric Railway & Transport Company has not bargained in good faith, and has failed and refused to consent to arbitrate in accordance with the terms of previous agreements which have been in effect between the parties, and which have always been adequate for the settlement of the differences between the parties, and have failed and refused to accept present and outstanding offers by Division 998 to so arbitrate and settle their differences; in that 98 the Milwaukee Electric Railway and Transport Company is using the Wisconsin Statutes, the validity of which Division 998 denies, as a shield against its duty and obligation under State and Federal Statutes to bargain collectively and in good faith.

V.

In the event of denial of the above motions, and each of them, and only in that event, and without waiver of or prejudice to said motion, then Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the Order Appointing Arbitrators issued by the Wisconsin Employment Relations Board on January 31, 1949, be vacated and set aside, and that all further proceedings herein, including the instant one, be terminated forthwith for the reason that if there is an "impasse and stalemate" it is solely of the employer's creation, and, therefore, the money of the taxpayers of the State of Wisconsin should not be appropriated and spent at the request of the employer and upon its Petition.

VI.

In the event of denial of the above motions, and each of them, and only in that event, and without waiver of or prejudice to said motion, then Division 998, Amalgamated Association of  
99 Street, Electric Railway and Motor Coach Employes of America, affiliated with the American Federation of Labor, moves the Board as follows:

That the Order Appointing Arbitrators issued by the Wisconsin Employment Relations Board on January 31, 1949, be vacated and set aside, and that all further proceedings herein, includ-



ing the instant one, be terminated forthwith because of the failure of the Wisconsin Employment Relations Board to conduct a hearing on the question of whether or not there is, in fact, an impasse and stalemate notwithstanding good faith efforts on the part of both sides to such dispute, and for the purpose of determining whether, in fact, if there is such an impasse and stalemate such impasse and stalemate will cause or is likely to cause the interruption of an essential service; and in this connection Division 998 denies that any or all of such conditions precedent to the Appointment of Arbitrators under the Statutes do now exist.

Respectfully submitted,

Padway, Goldberg & Previant,

Attorneys for Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor.

100-103 **AFFIDAVIT IN SUPPORT OF MOTION.**

(Venue and title omitted.)

State of Wisconsin }  
Milwaukee County } ss.

George Koechel, being first duly sworn, on oath, deposes and says, that he is President of Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of

America, affiliated with the American Federation of Labor (hereinafter referred to as the Union), and that he makes this affidavit on behalf of such organization and the members thereof, being first duly authorized so to do;

And that this affidavit is supplementary to the affidavit previously filed in this cause on the 5th day of January, 1949;

That he repeats and reaffirms the allegations contained in such affidavit and incorporates the same herein;

That after the appointment of Nathan P. Fein-  
101 singer as Conciliator herein by the Wisconsin Employment Relations Board on January 5, 1949, representatives of the Union and the Company met with such Conciliator, the Union, however, renewing its objections to the appointment of the Conciliator and to the validity of the law and meeting with such Conciliator subject to and without prejudice to such objections;

That the Company repeatedly, during the course of such conciliation, insisted upon the necessity of using the provisions of the Wisconsin Statutes relating to compulsory arbitration and stated that the only proper way of determining the dispute between the parties would be by submission of the dispute under the terms of such Statute;

That during the course of such conciliation hearings the Company refused to bargain collectively and in good faith as required by the

State and Federal Statutes and made a final offer of settlement to the Union which, in fact, resulted in a reduction of its original offer of settlement to the Union:

That during the course of and after the termination of the conciliation proceedings the Company maintained the position that the provisions of the Wisconsin Statutes relating to compulsory arbitration would automatically be invoked upon failure of the conciliation process, regardless of the conditions and circumstances then existing, and continually relied upon this misconstruction and misinterpretation of the Statute for the purpose of evading its obligations under the law to bargain collectively and in good faith:

- 102 That on the 19th day of January, 1949 the Wisconsin Employment Relations Board entered an Order Extending Time of Conciliator in which it found, among other things,

“That such dispute is not likely to cause the interruption of an essential service at the present time.”;

That there is now pending in the Circuit Court for Milwaukee County a lawsuit entitled

Wisconsin Employment Relations Board,  
Plaintiff,  
vs. Case No. 218489.

Amalgamated Association of Street, Electric  
Railway and Motor Coach Employes of  
America, Division 998, et al.,

Defendants.

in which, among other things, the Wisconsin Employment Relations Board asks for permanent injunction restraining the Union, its officers and its members

“from calling a strike, going out on strike, or causing any work stoppage or slowdown which would cause an interruption of the public passenger service of the Milwaukee Electric Railway & Transport Company, in the State of Wisconsin, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said Company, and for such other relief as may be appropriate in the premises.”;

That hearing upon such application for a permanent injunction will be had before the Circuit Court of Milwaukee County on February 16, 1949; that it is the intention and purpose of the Union and its members, without waiver of and without prejudice to, its objections to the constitutionality and validity of whatever laws may be applicable, to comply with such laws until such time as they may be declared unconstitutional, void or inapplicable.

George Koechel.

Subscribed and sworn to before me this 2nd day of February, A. D. 1949.

David Previant,  
Notary Public, Milwaukee County,  
Wisconsin.

My commission expires May 7, A. D. 1950.

104 Cover.

105 **HEARING ON APPOINTMENT OF  
ARBITRATORS.**

Chairman Gooding: The purpose of this meeting is to give each party an opportunity to strike one name in the list submitted to the parties previously, and to attempt to frame the issues submitted to the Board of Arbitration when that Board meets.

Mr. Previant: We have certain preliminary motions and requests to make for the purpose of the record. We intend no reflection upon the character or integrity of either of the members of the Wisconsin Employment Relations Board or the Arbitration Panel, but are asking the following questions and making the following motions for the purpose of having adequate record upon which we may properly challenge the law which has been invoked by the Company and the Board in this case.

First we move that the record of the hearing on the appointment of the Conciliator which was held on January 5, 1949 be made a part of the record herein, including the motions then made.

Chairman: It is already part of the record.

Mr. Previant: We would like the record of this hearing to show that the motions made at that time were renewed at the first hearing with the Conciliator, and that the Union participated in the conciliation hearings without prejudice to

and without waiver of such motions and we are now renewing such motions here.

Next we move that the record herein include the order extending the time of the Conciliator, as well as the order appointing the Panel of Conciliators.

Chairman: That is part of the record.

Mr. Previant: We move that the Conciliator's report to the Board dated January 29, 1949 be made a part of the record herein.

While we appreciate that ordinarily those conciliation reports are supposed to be confidential, we make this request because it appears from the Order appointing the Panel of Arbitrators that he held that a continuation of the dispute will cause or is likely to cause the interruption of an essential service.

107 Chairman: I say for the record now that his Report doesn't refer to any interruption of the service, but his Report, in connection with everything else that has occurred herein, his Report does indicate the matter was not adjusted and that no adjustment was apparently possible, and it was on the basis of that Report, plus the matters that preceded it, that led to the appointment of this Board of Arbitration. I have assumed that these Reports, being required by the Statute, are a complete part of the record in this case.

108. **Discussion Concerning Method of Appointment**  
111 **of Panel of Arbitrators by Board.**

111 Mr. Previant: Finally, we'd like to know whether the Board's procedure permits either party to orally examine under oath the persons who are named on the Panel of Arbitrators for the purpose of determining whether any of such persons can be removed from the panel for cause and another person substituted without prejudice with our right to the one provision by the Statute?

Chairman: No, there is no such provision. I will say this, that each man here on this panel was questioned prior to his appointment or prior to being requested to serve as to whether or not he was in any way interested in the Transport Company or the Electric Company or any of its subsidiaries, or whether he was interested in any way in the Union or in any dispute between the parties, and they all advised us they were not, and had no connections with either one.

111 At this point Division 998 submitted its Motion for Dismissal together with Supporting Affidavit and read parts of it into the record.

115 Chairman: The motion will be denied.

115 Mr. Previant: At this time, then, we would like to make the following statement for the record: It is the intention of Division 998 to participate in the selection of the Board of Arbitration, and the subsequent proceedings before that Board, without waiver of or prejudice to the motions and objections already made relating to the



validity of the law under which we are proceeding, the appropriateness of invoking the law if it is valid under the circumstances of this case, and the qualifications of the members of the Board of Arbitration to act, as well as their jurisdiction to act. We are participating under the duress and coercion resulting from application of Chapter 414, Wisconsin Law 1948, which by precluding us from engaging in concerted activities for the purpose of collective bargaining or other mutual aid and protection places in jeopardy our job seniority and pension rights and the maintenance and improvement of our hours, wages and working conditions, and which affords us no other method of relief except to participate in their proceedings under protest. And at this time we want to make the motion that all of the proceedings in this case up until now become a part of the record before the Board of Arbitration so that in the event of any subsequent appeal the entire proceedings in this case, from the time of the setting of the hearing for the appointment of a Conciliator, will be before the Court.

- 116 (A coin was then flipped to determine which party would first strike one name from the list submitted by the Board.) Each party then struck one name from the list of five submitted to them and the Chairman of the Board announced that the Board of Arbitrators will consist of Herman Rauch, Carl Ludwig and Dr. J. Martin Klotzsch.

116-120 Further discussion.

121 Certificate of Reporter.

122-123

**ORDER APPOINTING BOARD OF  
ARBITRATION  
and  
FIXING TIME AND PLACE  
OF HEARING.**

(Venue and title omitted.)

The Wisconsin Employment Relations Board having heretofore and on the 31st day of January, 1949, submitted to the parties a list of five names taken from the panel of arbitrators provided for by Section 111.53 of the Wisconsin Statutes, and representatives of the parties having met at the Court House in the City of Milwaukee, Milwaukee County, Wisconsin, on the 3rd day of February, 1949, at three o'clock in the afternoon, at which time each of the parties struck one name from the five submitted;

Now, Therefore, it is

**Ordered**

That the following named persons, being the three remaining after each of the parties have exercised their right of strike, shall constitute the Board of Arbitration to determine the dispute between the parties, to-wit:

Carl J. Ludwig, Milwaukee, Wisconsin;

J. Martin Klotzsch, Milwaukee, Wisconsin;

H. Herman Rauch, Milwaukee, Wisconsin.

123 It Is Further Ordered that Carl J. Ludwig, one of the above named members of the Board

of Arbitration, be, and he hereby is designated to act as Chairman of said Arbitration Board.

It Is Further Ordered that said Board of Arbitration will meet at the Court House in the City of Milwaukee, Milwaukee County, Wisconsin, on the 17th day of February, 1949, at two o'clock in the afternoon, at which time the issues to be determined by the Board of Arbitration will be framed, and evidence will be received relating to such issues.

Given under our hands and seal at the City of Madison, Wisconsin, this 10th day of February, 1949.

Wisconsin Employment Relations  
Board,

(Seal)

By L. E. Gooding /s/

L. E. Gooding, Chairman

J. E. Fitzgibbon /s/

J. E. Fitzgibbon, Commissioner

Henry C. Rule /s/

Henry C. Rule, Commissioner.

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## **TRANSCRIPT OF TESTIMONY AND RECORD**

### **At First Meeting of Board of Arbitration and Wisconsin Employment Relations Board With the Parties.**

Chairman: Now we are proceeding a little bit differently today than we ordinarily have in these arbitrations. Ordinarily, this is the first hearing of the Board of Arbitration, but because of the fact issues have not been resolved

or determined upon, we thought it was proper to first attempt today to determine on what issues are going to be submitted to this Board of Arbitration, what questions are going to be submitted to them, and then turn the matter over to the Board of Arbitration to proceed from there on up. We had better first get the appearances on behalf of the Company and the Union. Shaw, Muskat & Paulsen, by Mr. F. H. Prosser, for the Company, and on behalf of the Union, Padway, Goldberg & Previant, by Mr. Previant.

Mr. Previant: Before any further proceedings, I want to repeat for the purposes of the record the objections and the motions which we filed at the time the Board of Arbitration was constituted and want to again repeat and re-emphasize that our participation in these proceedings is under duress of the Wisconsin Statute, and without waiver of or without prejudice to those motions and objection which have previously been filed and which are part of this record.

128 Chairman: We take the position that once the Board of Arbitration is appointed, and once the issues are framed, that from there on out it is their problem; everything that arises from there on is their problem. Now we are going to submit to them the dispute that now exists between the Company and the Union with reference to a collective bargaining agreement that is to be in effect after their determination as it is raised by the proposal of the Company and the counter-proposals of the Union or the proposals of the

Union and the counter-proposals of the Company, whichever way you want to fix it.

144 Certificate of Official Reporter.

145- Order Extending Time for Board of Arbitra-  
146 tion Award.

147- **FINDINGS OF BOARD OF**  
174 **ARBITRATION.**

(Venue and title omitted.)

This is a proceeding under Subchapter III of Chapter 111 of the Wisconsin Statutes. This Board of Arbitration, hereinafter referred to as the Board, was appointed by order of the Wisconsin Employment Relations Board, hereinafter referred to as the State Board, which order is dated February 10, 1949. On March 7, 1949, the State Board ordered the time within which the Board hand down its findings be extended to the 11th day of April, 1949.

The State Board order of February 10, 1949, also set February 17th at 2:00 o'clock in the afternoon at the Court House in the City of Milwaukee, Wisconsin, as the date of first meeting at which time the issues were to be framed and evidence received relating to such issues.

The Board met on February 17, 1949, pursuant to said order, and the parties appeared and submitted written statements of their requests for provisions to be embodied in an agreement between them, and such requests for change

in the old contract are set forth in Union Exhibits 1 and 2 and Company Exhibit A 3. The conflicting positions stated in these exhibits have been treated by this Board as the issues in this proceeding.

No evidence was received at such hearing on February 17, 1949, and the hearing was adjourned to March 1, 1949, over the objection of the Union. Hearings were held on March 11th and thereafter, terminating March 29th without objection of either party to the time convening or adjourning of any such hearing, and both parties were represented and participated at all of said hearings.

Having considered and reviewed all the evidence, including the exhibits, and having considered all of the criteria required to be considered under the statute as well as other considerations urged upon the Board by the parties as being normally and traditionally taken into account in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties, the Board makes the following findings, decision and order.

#### FINDINGS OF FACT.

1. The Milwaukee Electric Railway and Transport Company, hereinafter referred to as "the company" or "the Transport Company", is a public utility which, since its organization in 1938, has owned and operated all except a few

of the streetcar, trolley and motor bus public transportation facilities in the City of Milwaukee. It has a total of approximately 3,100 employees. Of this number about 2,700 are in the collective bargaining unit represented by the 148 Union (Division 998) here involved. "Operators" (streetcar, trolley bus, or motor bus) constitute about 69% (1,850) of the unit. They are the "key" group in the unit.

2. The Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as "the Union" is the duly accredited representative for collective bargaining purposes of the company's operating and maintenance employees whose occupations are listed in the wage schedules included as Exhibit "A" attached to the General Labor Agreement between the parties which was executed June 11, 1948, and hereinafter referred to as the old contract.

The Union has had unbroken contractual relations with the owners of the property here involved since November, 1934, and with the present owner, the Transport Company, since it has been operating the property.

3. The old contract was signed June 11, 1948, and was effective from July 1, 1948, to December 31, 1948, "and thereafter from year to year unless terminated as herein provided . . ." If provided: "Each party retains the unqualified right to terminate this agreement as of December 31, 1948, or on any subsequent anniversary



thereof, by delivering to the other party a written notice of termination not less than sixty (60) days prior to December 31, . . . ." (Article XII, Section 21).

Article XII, Section 22, provided as follows:

"If either party desires to negotiate any changes or modifications in Exhibit 'A', attached hereto, to become effective on January 1, 1949, or any subsequent anniversary date, it shall notify the other party in writing of the desire to enter into negotiations for that purpose, describing specifically all of the changes desired, not less than sixty (60) days prior to the end of said initial term or any annual extension thereof. In the event that the parties cannot reach an agreement on the proposed changes and notice of cancellation of this contract has not been given, as provided in Paragraph 21 of Article XII, then such proposed changes may be submitted to arbitration, subject to the provisions of Articles IV and V of this agreement."

On October 27, 1948, the union submitted to the company written proposals for certain specified changes in the old contract and requested a conference. On October 29, 1948, the company delivered to the union a written notice acknowledging receipt of the union's letter of October 27th and stating that pursuant to Article XII of the General Labor Agreement dated June 11, 1948, "the company hereby terminates and cancels said agreement as of December 31, 1948."

The notice further states a willingness to commence negotiations as early as convenient for the purpose of reaching an agreement for the calendar year 1949. The notice was accompanied by proposals for a new contract and observations relative to these proposals. The proposals submitted did not constitute a complete contract, but included specific proposals and a general suggestion that Exhibit "A" of the old contract be retained except for the changes proposed.

Negotiations during November and December, 1948, resulted in no agreement. During these negotiations the union proposed arbitration under the terms of the old contract, but with this modification: that if the parties failed to agree, a third arbitrator be chosen from a panel of five to be submitted to the parties by the Federal Mediation and Conciliation Board, each party to strike two names from the panel and the remaining member to become the chairman of the arbitration board. This offer was rejected by the company, and negotiations thereafter broke down.

149 We find that the Company's notice of termination operated to terminate the June, 1948, General Labor Agreement on December 31, 1948, and we further find that the arbitration proposal of the union just referred to was not in substance a proposal for arbitration under the terms of the contract.

Though the contract terminated on December 31, 1948, the terms and conditions of the contract

have continued to govern the relations between the parties.

4. During these proceedings the Union did not withdraw any of its proposals or consent to any of the Company's proposals. It did state that no evidence would be introduced in support of certain of its own proposals.

The Company, at the hearing, specifically withdrew its objection to some of the Union proposals, and withdrew its objection to some other Union proposals subject to qualifications. The qualifications relating to agreement upon a five-day week were called "conditions." Those Union proposals, which were accepted in toto by the Company, eliminate some areas of dispute, and those given a qualified acceptance narrow the area of dispute.

5. The old contract contained two basic sections; the first, entitled "General Labor Agreement," provided for matters like "recognition," the "grievance procedure," etc. The signatures of the parties follow this portion. The second part, entitled "Exhibit A," dealt with "Wages, Hours and Working Conditions," and was, by reference, incorporated into the first (the signed) portion.

The Company's revised "conditional" proposals submitted at the hearing were confined to the "Exhibit A" matter of the old contract. It made no changes in its original proposals to amend the first general section. The Union's pro-

posals affected only the terms in the "Exhibit A" section of the old contract.

The Company's proposals for changes in the old contract involve changes ranging from strictly language differences to basic changes. They also involve shifting, renumbering and re-titling many of the old provisions. The **comparison**, therefore, must be made by **subject matter covered rather than by title or number**.

6. In the initial paragraph which identifies the parties the Company requests certain word changes and deletions. One request is designed to change the application of the agreement. It involves the deletion of the words, "its successors and assigns." The effect of the deletion is to confine the application of the terms of the agreement to the Company and cease to make it apply to any possible successor such as a new owner taking over a portion or all of the property. This proposed deletion is related to a later proposed new provision with similar objectives and found in Article V, Section 2, of the proposal.

No convincing need for this change has been demonstrated. The provision in question has caused no difficulty, and any future successor of the Company not only has the right of termination provided by contract, but such protection as is provided by law to the Transport Company. The request is, therefore, denied.

7. The Company proposes changes in the Statement of Objectives (Article I). **Section 2** of the

old contract is, in effect, a "no strike" provision. The Company proposes both language and substantive changes and additions.

(a) The recognition of the obligation to perform essential public service "without unnecessary interruption" is by the two parties (the Company **and the Union**) rather than, as in the old contract, "the company and its employees."

150 (b) It adds a new provision permitting the "Discharge" by the Company of any employee who fails to abide by the service continuation commitment.

(c) The Company is made liable for indemnification for all wage losses suffered by its employees if it should engage in a "lock-out"—the latter being expressly prohibited.

These proposed changes are substantial. No evidence was introduced in their support, and the requested changes are, therefore, denied.

8. The Company's proposed Article II is entitled "Union and Employee Security" clause. In the old contract it is entitled "Recognition" and includes the "all Union" provision. The Company's proposal collects a series of provisions from various sections of the old contract. It proposes changes ranging from word or language changes to basic modifications and additions.

(a) It proposes that all employees (within the Unit) become members of the union

"within sixty days." The old contract provided that they "shall be members . . ."

(b) It proposes to define "good standing" with the Union by making the sole test the tendering of "such initiation fees and periodic dues as are uniformly required of all other similarly classified members of the association."

(c) It proposes a commitment by the Union and its membership not to "discriminate against any employee" and not to "arbitrarily or capriciously suspend or expel any member from the association."

(d) It proposes a provision, in the nature of a clarification or an old provision, that "Disciplinary Suspensions and Discharges shall be subject to grievance and arbitration . . ."

While there is much in this proposal which seems unobjectionable and in the interests of clarity, there is also no proof of need of the suggested changes. Changes in phraseology to clarify meaning are always desirable, but such changes should be brought about by negotiation rather than arbitration. Language, however awkward, often acquires by usage a clarity of meaning which should not be lightly discarded, and new language sometimes creates more problems than it eliminates. The parties become accustomed to old language and may be confused by changes. Then, too, changes made by well inten-



tioned revisors solely for purposes of clarification may later appear substantial to parties confronted with specific problems.

As to the substantial changes incorporated in these proposals, no evidence of need has been offered. For the reasons above stated, the Company's Article II is denied.

9. The Company's proposed Article III, entitled "Collective Bargaining" incorporates the "Recognition" and the "Negotiation and Grievance Procedure" provisions. It makes additions to the terms of the old contract by:

(a) Circumscribing the jurisdiction of arbitrators.

(b) Placing a ten-day limitation on the presentation by either party of grievances which may arise. (Old provision limited the company to seventy-two hours; no limit on employee.)

(c) It defines "employee."

151 The proposal to safeguard the provisions of the contract from change by arbitration during its initial term was not supported by the introduction of evidence, and the request for it is denied.

The proposal for a limitation on grievances by either party appears in principle to have merit. The lack of such a rule has not been shown to have caused any serious difficulty in the past; the request, therefore, is denied.



The proposal to define the term "employee" more sharply is denied for the reason given for the denial of the Company's proposed Article II.

10. The Company's proposed Article IV relates to "Arbitration". It is a complete substitute for the old provision. It differs basically from the old contract in the following respects:

(a) It eliminates the "dead end" features of the old contract by referring the appointment of the third member of the Arbitration Board to the Wisconsin Employment Relations Board in case the two appointees of the the parties cannot agree on the third member.

(b) It limits arbitration to matters of interpretation and enforcement of the contract.

(c) It proposes that matters related to extension or modification of the contract be referred to arbitration under the "Utilities Law".

(d) It clarifies the provisions of the old contract which make "disciplinary actions" subject to the Grievance procedure.

The arbitration clause of the old contract has caused the parties no trouble. The difficulty which caused the old contract to terminate without renewal cannot be blamed on the arbitration clause because neither party proposed arbitration in accordance with that clause. The "dead end" clause was not to blame because the dispute never reached the "dead end".

The naming of a third arbitrator or specification of a method of choosing such an arbitrator is a matter of such importance that this Board will not force upon the parties something they have never been able to agree upon themselves in the absence of urgent need, and no such need has been demonstrated. Even though the "dead end" might be reached at some time in the future, it would be no "dead end" in fact because a utility law arbitration would resolve the deadlock.

Should this law be held invalid by the courts, the order of this statutory board would also become inoperative, and if the law should be modified or repealed, which cannot happen for at least two years, any order of this board will have run its statutory time limit of one year.

For these reasons and for the general reason given with reference to the Company's proposed Article II, the Company's proposed Article IV is denied.

11. The Company's proposed Article V would be entitled "Management" and would become the "Management" clause.

It combines, with minor changes, the old provisions dealing with management prerogative matters.

For the reasons given for the denial of the Company's proposed Article II, the Company's proposed Article V is denied.

152 12. The Company's proposed Article VI is a new provision stating that "nothing in the con-

tract . . . shall be construed as guarantee of daily, weekly, monthly or annual work or pay.”

The company seeks here a rule of strict construction similar to rules applied by the courts with reference to penalties. Whether such a rule is appropriate cannot be intelligently determined without a careful examination of every provision of the entire contract with reference to every hypothetical case which might arise under each affected clause. We are unprepared to assume this responsibility and feel that in the absence of evidence of need for this clause, it should not be added by this board. The request is, therefore, denied.

13. The Company's proposed Article VII deals with the duration of the contract in language differing from that in the old Article VII. It also deals with notice of modification or termination, or possible arbitration of dispute on the terms of a new agreement. It proposes that the latter type of arbitration be conducted under the provisions of the Utility Law.

The Company also proposed deletion of the old provision requiring the Company to bring charges against an employee “within seventy-two hours after notice of the alleged offense”. The Company proposed the substitution of the clause in Article III providing that both the Company and the Union shall file grievance within ten days.

The Company's proposed Section 1 of Article VII is denied for the reasons previously given

for the denial of the requested Article II and Article IV.

The Company's proposal to eliminate Paragraph 13 of the old contract relative to a seventy-hour limitation for Company charges against an employee is denied for the reasons previously stated for the denial of the requested Article III.

### EXHIBIT "A".

#### **Wages, Hours and Working Conditions.**

(Old language):

"The following rules and regulations apply to employees for whom the association is collective bargaining agent and are part of the general agreement . . ."

**14. Article XIII, Section C, Sub-Section 12**  
(Transportation Department) Relates to "Off Days."

The old clause provided that **Trainmen and Bus drivers holding regular runs**

(a) "shall be allowed 3 days off every 2 weeks."

(b) that "Sundays off shall be equally distributed."

**Section D, Sub-Section 38**—Relates to overtime pay for all Transportation operators.

The old clause provided:

(a) time and one-half for "paid for time" in excess of 8 hours per day or 40 hours per

week (exclusive of allowances for sick leave, vacations or Holiday Premium pay).

153 (b) no pyramiding ("duplication") of time and one-half.

### **Section D, Sub-Section 13.**

The old clause required all operators to take off at least the number of days scheduled.

In respect to these cited provisions the **Union** proposes the following changes:

(a) That trainmen and bus operators holding regular runs be given 2 "off days" per week.

(b) That the "off day" schedule be "negotiated" by the parties.

(c) That the time and one-half provided in the old agreement (Article XIII, Section D 40) for all "off day work" should be paid "separate and apart from any other daily or weekly overtime payments."

(d) That the "no pyramiding of overtime" provision be deleted from the old clause.

The **Company** in its original proposal made provision for overtime after 8 hours per day only. It deleted the old provision for weekly overtime (after 40 hours).

In its revised proposal presented during the course of the hearing, it withdrew its objection to:

(a) "2 off days per week".

(b) to overtime after 40 hours per week.

Under the old agreement the trainmen and bus operators who held regular runs were **guaranteed** 44 pay hours per week. This guarantee included 4 hours at the overtime rate. Neither party proposed to continue the overtime guarantee.

The record shows that the normal work schedule proposed by the Union is in effect in a substantial majority of industries with labor agreements. It also shows that many transit companies are subject to such provisions. The railway industry recently established the 5-day week with time and one-half for "off day" work.

There is no evidence that there is a practice or a tendency in the transit industry to pay for "off day" work at the rate of the time and one-half - "separate and apart from any daily or weekly overtime." Nor is there any evidence that other enterprises or businesses which require week-around operation tend to make such payments.

There is a conflict between the Union's proposal to pay time and one-half for "off day" work and the old provision (Article XIII, Section C, Sub-Section 13) providing the requirement to "take off" the scheduled off days.

In its revised proposal, the Company urged that it be granted some time to effect the change over to the 5-day week. It suggested mid-September as a possible date.

The Company has a duty to provide adequate transportation service. If the "2 off days per



week" requirement were placed in effect immediately, the fulfillment of this obligation might (on account of insufficient personnel) be difficult, if not impossible. It is the Board's opinion therefore, that the provisions of Article XIII, Section C, Sub-Section 13 of the old agreement should be suspended until September 15, 1949.

- 154 The **Union** proposes that "off day" schedules should be "negotiated" by the parties. Its object is to provide, as far as possible, successive and desirable days off. The Company proposed to "discuss" such schedules to achieve that result and to avoid an impasse.

It is the opinion of the Board that:

(a) Two "off days" per week should be established.

(b) "Off Day" schedules should be discussed with the Union before they are put into effect and should be subject to the grievance procedure.

(c) Overtime should be payable after 8 hours per day or 40 hours per week without pyramiding such overtime (old provision).

(d) The requirement that "off days" be taken should be suspended until September 15, 1949.

#### 15. **Article XIII, Section C, Subsection 14.**

The issue here involved is related to "**Spread and Run Limitations.**"



The **Union** proposes that:

(a) **60%** (old—50%) of all runs must be completed within 9 hours (old—9½) hours.

(b) Not over 12% (same as old) of the total runs shall exceed **10½** (old—12½) hours; no run shall exceed **12** (old—13½) hours.

(c) (New Provision) “Regular scheduled Saturday and Sunday runs shall not finish later than the week day run to which they are attached.”

(d) (Modification of old Article XIII, Section C, Subsection 15)—“One piece runs shall not be less than 60% (old—50% in summer, 45% in winter) of the total regular runs **“at any one station”** (old—applied over all) and **“these runs shall be equally distributed between day and night runs** (new).”

#### **Section C, Subsection 15.**

The old provision as modified is attached to Subsection 14 above, and a new paragraph is proposed by the Union:

**“All Sunday runs shall be one piece runs.”**

At present:

(a) Approximately 54% of all runs are completed in 9½ hours. The Milwaukee practice is above that prevailing in the transit industry generally.

(b) A fraction less than 7% exceed 12½ hours; 42+ % exceed 10½ hours and 20+ %

exceed 12 hours. Milwaukee is above average when compared with key midwest and the larger Amalgamated properties. The maximum spread currently in effect in Milwaukee is 13 hours 5 minutes.

A provision of 13 hours for maximum spread is reasonable and would put Milwaukee above the average of transit companies, but not out of line with the well-established practice in the industry.

(c) About 50% of weekday runs finish later on Saturday and Sunday; a little more than one-third of the Saturday and Sunday runs finish from 1 to 15 minutes later than on week days; on Saturdays runs finish an average of 37 minutes later, on Sundays 43 minutes later than on week days.

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Transportation needs on Saturday and Sunday are substantially different from week days (as to time when needed). There is no evidence that the Company has been unreasonable in cutting the week-end runs.

(d) At present 52% of all runs are "one piece" runs; this percentage varies from 54% to 46% at the different stations. No station has 60%. To equalize the day and night "one piece" runs would eliminate about 20% of the regular runs, and necessitate returning to the "extra list" men who are now on regular runs. There was no showing that the equalization of day and night one piece runs would be practical, all things considered.

The request for all straight runs on Sunday would require the creation of "trippers" in lieu of present regular split runs to provide the required service.

It is the opinion of the Board:

(a) That **55%** of all runs should be completed within **9½** hours.

(b) That no runs should exceed **13** hours.

(c) That the request regarding Saturday and Sunday runs should be denied.

(d) That the request for equal distribution between day and night runs be denied; that the request relative to equal distribution of one piece runs between stations shall be denied except that "such runs shall be distributed as equally as practicable between the various stations."

(e) (Article XIII, Section C, Subdivision 15)—That the request for all one piece runs on Sunday be denied.

156    **16. Article XIII, Section C, Sub-Section 18**  
**(Transportation Department).**

The old clause provided that "Trainmen and Busmen who work on the night extra list shall not be required to work morning trippers."

The **Company** proposes that the prohibition be deleted and that an intervening period of **8** hours be required.

The old provision was negotiated and agreed upon by the parties. It allowed a normal rest

period between the end of one day's work and the beginning of the next. The adoption of the Company's proposal would make more extra men available for "trippers" during the morning peak load.

It is the opinion of the Board that the adoption of the Company's proposal would put an unreasonable burden on the health, comfort and convenience of the night extra operators, and therefore should be denied.

**17. Article XIII, Section C, Sub-Section 20**  
(Transportation Department).

The old agreement provided that "all trainmen and bus men shall be guaranteed at least the **number of hours** in their run . . ." while rendering certain named services.

The **Union** proposes to amend the old provision by **including** "spread time" premium in the guarantee.

The effect of the Union's proposal is to assure the employee no less "take home" pay than he would have earned on his regular run.

It is the opinion of the Board that the Union's request is reasonable, and therefore should be granted.

**18. Article XIII, Section C, Sub-Section 22**  
(Transportation Department).

In the old clause this paragraph establishes specified "time allowances" for named purposes.

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The **Union** proposes to make the following changes:

(a) Wisconsin Motor Bus city operators—10 minutes (old—5 minutes per day).

(b) Conductors and operators who sell passes—60 minutes per week (old—30 minutes).

(c) (new) Allow up to 90 minutes to trainmen and operators for time lost in picking runs.

(d) (new) Allow 2 minutes to collect receipts at Plankinton and Packard Avenues, northbound, on Route #66.

The **Company** proposed to delete the requirement which makes the old 30-minute pass turn-in time subject to time and one-half.

There is no showing that the money counting and turn-in time here in question is, on the average, inadequate to compensate the employees for the time consumed. The payment goes to all the named persons irrespective of the amount of money actually handled. Studies made by the Company indicated that the majority of the persons involved had completed their "check in" and went "off duty" not later than the time for 157 which they were paid. This evidence, though limited, is uncontested. The record also shows that while the pass price has increased, the sale of passes has decreased proportionately so that the total amount of money taken in has not materially changed.

The provision that time and one-half can apply on the "pass turn-in" time was negotiated and agreed upon by the parties. There is no evidence that the circumstances regarding the situation which impelled the action have been materially changed or that experience warrants the deletion.

The "2 minute" time allowance at Packard and Plankinton Avenues is not a "money allowance" as such. It is a request, in effect, that the Company be compelled to so schedule the run (#66) that the northbound run will have a 2-minute time stop at that point.

The record shows that no such allowance is needed for the fare collection work required. To the extent that any operator may feel that the schedule on that line is "too tight", considering the work requirements, he always has the right to such relief through the grievance procedure of the contract. There is no evidence that this means was ever seriously tried to solve the instant issue and that relief was denied.

It is the opinion of the Board that all the cited proposals advanced in relation to this issue be denied.

**19. Article XIII, Section D, Sub-Section 39**  
(Transportation Department).

The provision in the old agreement provided for the payment of time and one-half to operators for "paid for time in excess of 11½ con-



secutive hours separate and apart from any other daily or weekly overtime."

The **Union** proposed:

(a) To amend this provision by substituting "**11**" for the present  $11\frac{1}{2}$ .

(b) To delete the word "assigned" from the last sentence which reads: "Such premium (to men working extra parts) to be paid on time worked after .. hours spread which begins with the first paid for time **assigned** in the day."

The **Company's** revised proposal withdrew its original proposal to modify the old clause by substituting the word "premium" for the old words "daily or weekly overtime".

The record shows, in respect to the Union's proposal to pay "spread premium" **after 11 hours**, that some other transit companies among the midwest key properties and the larger Amalgamated group now have that provision; about an equal number of companies have a more liberal provision and the largest majority of companies have less liberal requirements. At present 32% of the runs exceed  $11\frac{1}{2}$  hours; 38% exceed 11 hours.

The Union requested to delete the word "assigned" from the language of the old agreement. No substantial need for the deletion was shown. While it is suggested as merely a clarifying proposal, there is not enough evidence in the record to establish that it would not produce a substantive change in the provision.



It is the opinion of the Board that the Union's proposals should be denied.

158. 20. **Article XIII, Section E, Sub-Section 42.**

The old clause required the Company "to furnish the association with . . . . copies of work assignment sheets, headway sheets and individual run schedules."

The **Union** proposes to add the language: "at least 7 days prior to picking."

The evidence does not indicate whether the designated period of time is either feasible or necessary. The purpose for the request is to allow adequate time for reviewing the new run schedules before "picking" time.

It is the opinion of the Board that the phrase "a reasonable time" should be substituted for the Union's proposed "at least 7 days."

21. **Article XIII, Section G, Sub-Section 59**  
(Station Clerks and Supply Car Clerks).

The old provision dealt with the monthly rates payable to "Station Clerks and Supply Car Clerks" and "Bulletin Clerks"; established that the monthly rates were based on 51 hours per week at straight time; provided that **overtime** at the half time rate was payable over 40 hours and up to 51 hours per week and that time and one-half was payable after 51 hours. It provided for a 2¢ per hour night shift differential for Station Clerks and provided that "**clerks shall be required to take at least one day off**

per week." It provided the pay rate for "part time clerks" and incorporated Seniority rights by reference.

The **Company** originally proposed that the overtime rate of time and one-half apply after 8 hours per day only. Its revised proposal provides:

(a) That such overtime rate apply "after 8 hours per day or 40 hours per week" (without pyramiding).

(b) That "3 days off in each 2 weeks" be allowed.

The **Union** made no proposal to change the old provisions.

The **Company's** revised proposal places the clerks in common with other employees on an 8-hour day and 40-hour week. The normal 2 days off per week which are companions to such a schedule would be effected gradually under the 3 days off in 2 weeks proposal—a step in that direction from the one off day per week requirement in the old contract.

It is the opinion of the Board that all the old provisions, other than those dealing with the wage rates, should be amended as proposed by the Company.

22. **Article XIV, Section A, Sub-Section 60**  
(Way and Structures Department Employees).

The old clause provided for "time and one-half" after 8 hours per day and for **off day** work except when performed in-exchange with another

employee. (Sub-Section 80 provided a 40-hour per week, Monday through Friday working schedule.)

The **Company's** original proposal deleted the old provisions relative to "off day" work exchange. Its revised proposal withdrew its request for the deletion.

The **Union** proposed no change in this provision. No need for change has been shown.

It is the opinion of the Board that the terms of the clause in the old agreement should be continued.

159 23. **Article XIV, Section A, Sub-Section 66**  
(Way and Structures Department).

The old provision required "a minimum of 3 hours pay" to "outside workers" who report for work but cannot work on account of inclement weather. It also provided a similar guarantee in case they were called back to work on such a day after having been dismissed.

The **Union** proposes that the guarantee be increased to **5 hours** in each case.

A large number of the Amalgamated companies (in cities over half million population) and of the midwest companies have no such guarantee. Many of them have the same provision or guarantee less hours. A few have better provisions.

It is the opinion of the Board that the Union's request should be denied.

24. **Article XIV, Section A, Sub-Section 70**  
(Way and Structures Department).

The old clause provides a **25¢ per hour premium** payment to employees "who work on freshly creosoted ties."

The **Union** proposed to amend this provision by providing that work on "ties or blocks soaked with oil or naphtha solution" be included in this provision.

During the hearing the Company withdrew its objection to the Union's proposal.

It is the opinion of the Board that the old provision should be amended as proposed by the Union.

25. **Article XIV, Section A, Sub-Section 71.**

The old clause provided that "trackmen doing **paving** work" should be paid a premium of 5¢ per hour while doing such work; the same premium was prescribed for "trackmen and laborers operating concrete breakers and jack hammers."

The **Union** proposed that the word "Men" be substituted for the words "Trackmen and Laborers."

At the time of the hearing the Company withdrew its objection to the Union's proposal.

It is the opinion of the Board that the amendment to the old clause proposed by the Union should be granted.

26. **Article XIV, (new) Section A, Sub-Section 71 (a)** (Way and Structures Department).

The **Union** proposes that a 10¢ per hour premium should be paid to operators of F. W. D. trucks and "Sand Hopper" trucks (#40).

The evidence shows that the F. W. D. trucks are used for cutting ice, grading dirt, or hauling materials. The Hopper truck is used for hauling and distributing sand to the various places where it is needed. It shows that when the F. W. D. trucks are operated for ice cutting or dirt grading purposes, the work requires more than usual concentration and carefulness. It does not show that when the F. W. D. trucks are driven merely for the purpose of general hauling that the work requires unusual skill or effort.

- 160 It is the opinion of the Board that the Union's request for a 10¢ premium while driving the Four Wheel Drive trucks and the Sand Hopper trucks should be granted, to the extent of providing such a premium while doing ice cutting and grading work.

27. **Article XIV, Section B, Sub-Section 75** (Way and Structures Department).

The old clause provides, among other things, that . . . "the employee with the longest service in the occupational group shall be given preference on jobs in that group **if he is not needed on other work** and is qualified."

The **Union** proposes to delete the emphasized portion of the old clause.

The record does not produce persuasive evidence that the desired change is necessary. The Union has never seriously pursued, as a grievance, a case of alleged discrimination under that provision so as to determine the meaning and application of the language here in question. The elimination of that language might produce results which go far beyond the expressed object of the deletion.

It is the judgment of the Board that the Union's proposal for amendment should be denied.

28. (a) **Article XIV, Section C, Sub-Section 85** (Way and Structures Department).

(b) **Article XVI, Section C, Sub-Section 138** (Traffic Department).

The old provisions require:

(a) A safe and healthful place of work.

(b) Equipment and machinery in good and safe working condition.

(c) Union members "use all safeguards furnished or required by the Company. . . ."

The Union proposes the deletion of the emphasized portions of the old agreement.

There is a similar provision under old Article XV, "Rolling Stock Department," Section C, Sub-Section 129, which conforms with the Union's request and which is sought to be reproduced here. No safety equipment purchased by the em-

ployee is now required. They are encouraged to purchase and wear safety shoes.

It is the opinion of the Board that the Union's request should be granted.

29. **Article XIV, Section D, Sub-Section 92**  
(Way and Structures Department).

The old clause (in addition to the wage rates which will not be considered here) contained:

(a) A "note" explaining that the monthly rates given for "yard foremen and section foremen" are the straight-time rates for a 44-hour work week.

(b) Provided, for the above named class of employees, half time overtime rate over 40 hours; time and one-half after 44 hours.

(c) It prescribed the formula for converting the monthly rates into hourly rates.

161 The **Company** in its original proposal requested deletion of the provisions following "(a)" above. The deletion of the special overtime provision applicable exclusively to yard foremen and section foremen had the effect of making the old general provision, **Article XIV, Section A, Sub-Section 60** (Way and Structures Department), apply. It provided for overtime after 8 hours per day and for overtime for "off day" work unless performed for the accommodation of a fellow employee. It also had the effect of making old **Article XIV, Section C, Sub-Section 80** (Way and Structures Department) apply. That general paragraph provided that the "working sched-



ule” for “Way and Structures Department” employees shall be “40 hours per week . . . Monday through Friday.” Thus the Company was, in effect, proposing an 8-hour day and 40-hour week with time and one-half for overtime and for Saturday and Sunday work, without duplicating overtime.

In its **revised proposal** the Company deleted the monthly rates, proposed only the hourly rates, and deleted the old clause’s “note” explained above.

The **Union** proposed that the “Section Foremen” be granted the old third year increase at the beginning of the second year. The Company agreed.

The object of the parties is to establish an 8-hour day and a 40-hour week with time and one-half for overtime in those departments where longer hours or lesser overtime rates now prevail. The deletion of everything in the “note” provisions will effect that objective.

It is the judgment of the Board that, except for the wage rates, and the “note” paragraph, the terms of the old clause should be retained.

**30. Article XIV, Section C, Sub-Section 100**  
(Ways and Structures Department).

The old clause applicable to **Watchmen** provides for:

(a) Time and one-half after 8 hours per day or 44 hours per week.

(b) Time and one-half for "off day" work, except when such work is an exchange to accommodate a fellow employee.

The **Union** proposed to provide that time and one-half should be **unconditional** and be paid "separate and apart from any other daily or weekly overtime."

The **Company** originally proposed time and one-half **after 8 hours per day** and for work on regular day off. Its revised proposal merely changes the "44" hours to "40 hours" (for weekly overtime) and retains the balance of the language.

There is no showing on the record that it is customary either in the transit industry or in other industries to pay watchmen time and one-half for "off day" work; "separate and apart from any other daily or weekly overtime," which, in effect, produces "double time" for the 6th and 7th day worked.

It is the opinion of the Board that the old provision, so amended as to pay weekly overtime after 40 hours, should be incorporated into the new agreement.

31. **Article XV, Section A, Sub-Section 101** (Rolling Stock Department).

The old clause provided for: time and one-half **after regular scheduled hours** in any one day and for work on the "regular day off," except where such work is an exchange to accommodate another employee.

The "working schedule" is:

162 (a) **Cold Springs Shop**—8 hours per day, 40 hours per week, Monday through Friday (paragraph 118).

(b) **Cold Spring Boiler Plant**—6 hours per day, 42 hours per week (paragraph 119).

(c) **Carhouse and Garage**—8 hours per day and 40 hours per week. Shall be scheduled to work "8 hours per day" (paragraph 120).

The **Union** proposes to amend the overtime provision relating to "off day" pay. It proposes to add that such overtime shall be paid "separate and apart from any other daily or weekly overtime payments."

The **Company's** original proposal was to pay time and one-half after 8 hours per day and for scheduled "off day" work. Its revised proposal withdrew its original demands.

There is no substantial evidence in the record that the **Union's** proposal compensating for "off day" work at the rate of time and one-half "separate and apart from any other daily or weekly overtime payments" is being applied to any extent in employments and enterprises comparable to that here involved.

It is the opinion of the **Board** that the **Union's** request should be denied.

**32. Article XV, Section A, Sub-Section 110**  
(Rolling Stock Department).

The old clause provides, in effect, that when an employee temporarily works in a classification higher than his own, he will receive either his regular rate or the higher rate for the entire day, depending upon which type of work occupied the majority of his time.

The **Union** proposes that when any employee performs a higher classification of work for "more than one hour on any one day" he shall receive the higher rate for the entire day.

The record shows that employees generally spend substantially more time on classifications of work below their own than they do in higher. When compared with comparable transit companies, the provision of the old agreement is at least as good as the average. The record does not show that the Company took undue advantage of the employees under the old provision.

It is the opinion of the Arbitration Board that the Union's request should be denied.

**33. Article XV, Section C, Sub-Section 119**  
(Rolling Stock Department).

Originally no proposal for change by either party.

Company's revised (conditional) proposal would amend the old clause so as to pay the Cold Spring Boiler Plant employees time and one-half after 6 hours per day or 40 hours per week (old —over 6 hours per day or 42 hours per week).

The Company's revised proposal has the effect of paying weekly overtime to the Boiler Plant employees after 40 hours per week. The Union made no proposal for change.

In view of the fact that the 40-hour week is being put into general effect on the property, it should also apply to these employees.

It is the opinion of the Board that overtime should be payable to the employees here in question after 6 hours per day or 40 hours per week.

163 34. **Article XV, Section C, Sub-Section 120**  
(Rolling Stock Department).

The old clause provided that "Carhouse and Garage" employees be paid overtime (time and one-half) for work in excess of 8 hours per day or 40 hours per week and that they "be scheduled to work 8 hours per day."

The **Union** proposed the following additional provisions:

(a) Those employees should be required to take their regular scheduled days off.

(b) Time and one-half shall be paid for all work performed on Saturdays, Sundays and Holidays.

The **Company's** original proposal was to delete the entire paragraph. Its revised proposal withdrew the proposal to delete.

The Union presented no conclusive evidence on the first proposal noted. There is no evidence that in the transit industry or in comparable

employments where week-around operation is indispensable and traditional, that the overtime, as such, for Saturdays, Sundays or Holidays is paid in any substantial degree.

It is the opinion of the Board that the Union's requests on this issue should be denied.

**35. Article XV, Section C, Sub-Section 123.5.**

The Union proposed the following new provisions:

(a) That "clerks and foremen" should be eliminated from the "Company work sheets."

(b) That employees with "specialists" classification should be assigned to "all shifts" in the "Carhouses and Garages."

The record shows that these issues involve the question of who should work and what classification of workers are needed at any given time.

It is the opinion of the Board that Section 111.58 of the Wisconsin Statutes, which provides that the Board shall make no award which would infringe upon the rights of the employers to manage his business, precludes a determination of these issues by this Board.

**36. Article XV, Section D, Sub-Section 133 (Rolling Stock Department).**

The old clause provides the wage schedule applicable to the Rolling Stock Department. The old schedule classifies "clerks" and "storekeepers" with "utility men" with the (top) rate of



\$1.32 per hour. Repairmen "B" are rated \$1.38 per hour (top).

The **Union** proposes that the "clerks" and "storekeepers" be reclassified to the Repairmen "B" class.

The evidence is not conclusive whether or not the job content of the "clerks" and "storekeepers" has so materially changed since the classifications were established in their present position to justify the upgrading here requested. A job evaluation made on the same basis as the classifications were originally established could most effectively determine this issue.

It is the opinion of the Board that the Union's request should be denied.

164    **37. Article XVI, Section A, Sub-Section 134.**

The **Union** proposes, in addition to a general wage rate increase, a reclassification upward of the "Freight Office" clerks (Grade A—old—\$240.75 per month top) to the "Telephone Information Clerks" classification (old—\$282.75 per month—top).

The **Company** originally proposed no changes. In its revised conditional proposal it suggested the following changes in the old clause:

(a) incorporate into the agreement only the "hourly rates."

(b) omit rates for terminal "handymen" and "janitor"; also general office "janitress."



(c) delete "note" which provides that the "monthly rates" are based on 44 hours per week.

There is no competent evidence to suggest that any of the changes here indicated are necessary or advisable.

It is the opinion of the Board that except for the wage rates and the weekly hour base for the monthly wages, the terms of the old provision should be continued.

**38. Article XVI, Section B, Sub-Section 136**  
(Traffic Department).

The **Union** proposes:

(a) Substitution of the word "because" in lieu of old "on account of" (relating to the application of seniority when work is "curtailed").

(b) Delete the provision that employees who "are off the payroll for more than one (1) year" have no further right to "re-employment" by the Company.

Nothing in the record indicates that these demands are either necessary or advisable.

It is the opinion of the Board that the Union's request should be denied.

**39. Article XVI, Section D, Sub-Section 139**  
(Traffic Department).

The **Company** originally proposed no change. In its revised proposal it **deleted** the entire

paragraph (deals with Company's right to require "monthly salaried" employees to put in "reasonable overtime" or "off schedule" work).

The deletion was based on the proposal that all monthly salaries be reduced to hourly wages and be so shown in the contract.

It is the opinion of the Board that the request to delete this paragraph should be denied.

40. **Article XVI, Section D, Sub-Section 140** (Traffic Department).

The **Company** originally proposed that overtime be paid after "8 hours per day." (Old— from 40 to 44 hours per week, one-half time [in addition to the straight time already in the monthly rate for 44 hours per week]; time and one-half after 8 hours per day or 44 hours per week). It also proposed to delete the provision that it will not be required to furnish overtime work.

165 Its revised proposal would pay time and one-half after 8 hours per day or 40 hours per week.

The object of the parties is to effectuate the 8-hour day and 5-day week.

It is the opinion of the Board that the terms of the old clause should be amended to incorporate the 8-hour day and the 40-hour week.

41. **Article XVI, Section D, Sub-Section 141**  
(Traffic Department).

The **Union** proposed:

- (a) "2 days off" each week (old—1 day).
- (b) New provision to pay time and one-half for all Saturday, Sunday and Holiday work.

The **Company's** original proposal retained the old "1 day off each week." Its revised proposal removed its objection to the Union's proposed "2 days off each week."

The "2 days" off each week establishes the 5-day week which the parties are seeking to accomplish. The evidence does not show that time and one-half for Saturdays, Sundays and Holidays is customary or fairly common either in the transit industry or in other enterprises with similar week-around operation needs.

It is the opinion of the Board that:

- (a) The old clause should be amended to provide for 2 days off each week.
- (b) The Union's proposal for time and one-half for Saturdays, Sundays and Holidays work, as such, be denied.

42. **Article XVII, Sub-Section 142** (Transportation Department).

The **Union** proposed to extend the old free city and suburban (orange lines) transportation provision to include the "Wisconsin Motor Bus" (Green Bus) lines.

The record shows that no free passes are issued on these lines. The Company executives have no such passes. There are generally parallel orange lines on which the employees can ride on their present passes. The Company agreed to make some adequate arrangement to provide free rides on this line for orange line operators whose work assignment is on the Green Bus lines.

It is the opinion of the Board that the Union's request should be denied.

#### 43. Article XIX, Sub-Sections 144 and 146.

The old clause relating to "vacations," when compared with the Union's and the Company's proposals, produces the following results:

Service Period	Old Clause	Union Proposal	Company Proposal
1-2 years	1 week	7 da.—8 hr. day	40 hours
over 2 years	2 weeks	14 da.—8 hr. day	80 hours
over 15 years	2 weeks	21 da.—8 hr. day	80 hours
	(union proposal)		
over 25 years	3 weeks	21 da.—8 hr. day	120 hours

166 Under the old clause, paragraph 146, a "week", for vacation purposes, was "the current scheduled hours included in the vacation period" except that for "trainmen and bus operators" 48 hours is the time applied.

The current average hours worked by trainmen and bus operators is 45.8 hours per week. This schedule was effected in the light of the old "44 hours per week guarantee." On that basis, when runs are cut so as to adapt them to the 40-hour week, the average hours per week will be about 42.

The vacations here in question will generally be taken during the transition period to the 40-hour week. The Company estimates that the change-over may not be completed before September 15, 1949.

About one-third of the Amalgamated larger transit companies and the key midwest companies have a 3-week vacation program. In those cases the initial requirements are generally either 15 years or 20 years. Three-week vacations in other industries is negligible.

It is the opinion of the Board:

(a) That to maintain, so far as possible, a parallel relationship between the actual hours worked (during the transition from the present work schedules to the 40-hour week) and the vacation pay, trainmen and bus operators should receive 1949 vacation pay on the basis of 45 hours per week at straight time.

(b) That the terms of the old clause should be retained in every other respect.

**44. Article XX, Sub-Sections 153 and 154 (Sick Leave and Excused Absences).**

(Sick leave and excused absences for hourly and monthly paid employees.)

The Union proposed:

(a) To delete, wherever it appears, the word "working" in the phrase "35 working days".

(b) Delete old sub-paragraph (e) to eliminate the **one day waiting period** before ~~sick~~ benefits are payable.

(c) Correct later cross references accordingly.

The proposal to compensate men for sickness even on off days would substantially increase costs to the company without serving the purpose of sick leave pay, which is to compensate for time lost without fault by the employee.

The request is denied.

The proposal to eliminate the one-day waiting period before sick benefits are payable is based on the claim that men now work while ill rather than lose a day's pay. This assertion, while perhaps true to a very limited extent, was supported by no evidence. The "one-day waiting period" rule was effective in the prevention of sick leave abuse. The union's request is denied.

#### 45. **Article XXII, Sub-Section 158.**

This clause in the old agreement provides for a minimum of 44 hours of work per week "up to and including December 31, 1948" and provides 167 for "3 off days every 2 weeks".

It is the opinion of the Board that this clause is obsolete and should be deleted.

#### 46. **Wages—General.**

There are approximately 2,700 employees in the bargaining unit, about 69% of whom are operators of streetcars, motor buses and track-

less trolleys. These operators are the predominant group, and traditionally in the transit industry, their wages usually establish a precedent for the wages of the other employees of the companies involved. This is definitely the case in Milwaukee.

The operator's job has certain characteristics which will be briefly mentioned here. The position does not require the type of skill resulting from long, specialized training such as the several years of apprenticeship normally required in so-called skilled occupations. The training period for an operator is a minimum of eighteen days, and a maximum of thirty days if he is trained for operation of buses, trackless trolleys and streetcars. It is assumed that his skill increases for one year, after which he receives his maximum rate of pay.

At the same time the operator must possess certain native skills and qualities which are not normally required in unskilled jobs. The mechanical skill required is that of a good driver of a vehicle. The prospective operator must have a driver's license and must have the driving ability required by operators of trucks and passenger automobiles. The operation of a streetcar or a trackless trolley is somewhat different from operation of other vehicles, but the same amount of judgment, ability to make a quick decision, reaction time and other such characteristics are important.

A second important requirement of an operator is ability to deal with the public. He daily



comes in contact with hundreds of people of all types, and he engages in a business transaction with each of them. As a consequence, he may have unpleasant experiences with passengers who are unreasonable, intoxicated, ill, belligerent or otherwise offensive. The responsibility of dealing with all types of people and representing the Company in its relation with them, having in mind the Company's high degree of responsibility for its passengers, requires in the operator a more than average degree of emotional stability, good judgment, tact and resourcefulness.

The operator's job is also characterized by a health hazard created by temperature and humidity extremes and constant exposure to crowds of people, many of whom suffer some stage of a contagious disease. There is no showing of a higher incidence of disease among operators than among others of their age and sex group, but some health hazard is obvious.

Another characteristic of the job is the undesirable hours of work required. The riding habits of the public vary from season to season, day to day and hour to hour, and the Company is required to furnish service twenty-four hours a day seven days a week in conformity with these habits. Week-day hours are characterized particularly by peak loads early in the morning and late in the afternoon, and no matter how skillfully the work is scheduled, the operators generally cannot work the same hours as do men in most other occupations, though after

years of service the right of seniority produces priority claim to the better working hours.

The operator's job both in Milwaukee and in other cities is also distinguished by a relative lack of opportunity of advancement within the field. There are few closely related occupations except those involving the same type of work and allowing no greater opportunity.

- 168 As compensation for some of the unfavorable aspects of the position, the operator does enjoy a steadiness of employment and ability to work for many years not found in most other occupations. This job security was demonstrated in Milwaukee by the fact that during the recent depression not a single man was laid off because of lack of work. The attraction of this feature of the work is evident from the relatively low quit rate of operators, particularly those who have acquired seniority and are in the higher age group. Approximately 440 former employees were drawing pensions in 1948. This job security also characterizes other employees in the unit whose quit rate is also very low in spite of the fact that other comparable jobs are available to them.

Another advantage of employment in this industry is the relatively large total of fringe payments which in effect add thirty-six cents per hour to direct pay. This is one of the highest rates in the country and must be taken into account when wage adjustments are considered.

A factor deserving of some mention is the Company's "ability to pay."

We deem a company's "ability to pay" as measured by the financial results of its operations to be a relevant factor within definite limitations in the determination of wages and working conditions. No company can expect to purchase labor substantially below prevailing market rates just because it is not making an adequate profit, nor can labor properly ask one company for compensation substantially above a top market rate because it is operating at a relatively high profit. But the market in transit wage rates and working conditions is not measurable with mathematical exactness, since there is some similarity, but no uniformity in contracts. A company more prosperous than others in the field should expect to be somewhat more liberal in wages and working conditions than a company in difficulties.

Since it took over this property in 1938 the operations of the Transport Company have not been notably profitable. Its 1948 operations resulted in a deficit, even though a temporary fare increase was in effect during four months of the year. Any substantial increase in wages will probably result in a deficit in 1949 unless a further fare increase is granted.

The monopoly position of transit companies makes "ability-to-pay" less of a rigidly limiting factor than it may be in a competitive business. A Wisconsin transit company may apply to the

Public Service Commission for a fare increase to enable the company to earn a fair return on its investment as well as to pay additional costs of operation. But the long delays before fare increases become operative and the fact that higher fares encourage competition from automobiles and increased walking habits limits the effectiveness of fare increases.

We do find, however, that even with the recent increase, Milwaukee's fares are not higher than those of comparable cities. If value of the service to the public is considered, as it must be, another fare increase based in whole or in part on increased labor costs may be necessary. Certainly increased labor costs in this situation cannot be denied merely because fare increases may thereby become necessary.

A review of the wage history of the employees in the Milwaukee transit property indicates that for the last ten years or more prior to the June, 1948, contract, they maintained or slightly improved their wage relationship relative to transit employees in other cities and production workers in Milwaukee County. For that reason this board feels that the main emphasis in any examination of their present position must be on the period beginning in May, 1948, even though reference to the wage history before that date is helpful.

Since May, 1948, the cost of living continued to rise until August or September, 1948, and then began to decline, and this decline has brought Milwaukee consumers' prices slightly under their

May, 1948, level, and the decline shows no definite signs of stopping. During the war and the  
169 post-war inflationary period in which prices were constantly rising, wages maintained a fairly close relationship to rising prices, and the increases in wages were often related to increases in the cost of living since the last previous settlement or arbitration. It does not necessarily follow, however, that stabilization or decline in the price level will cause a corresponding general decline in hourly wages. It is too early at this date to foresee clearly what effect the halt in increasing living costs will have on wages generally or in this particular industry, since very few labor agreements have been made, particularly in the transit industry, since the decline in living costs became noticeable.

This board seriously doubts that the mass of labor agreements in the United States and in the transit industry will cut wages to match price cuts, at least while the decline in the cost of living continues its present rather moderate downward trend. Wage increases in the transit industry since May, 1948, have been in the neighborhood of eight to fifteen cents per hour, and the two most significant settlements—significant because made during the 1949 period of declining prices—have been Toledo and Philadelphia, both of which granted an eight-cent an hour increase, Philadelphia after a strike and Toledo by negotiation. Though St. Louis granted a thirteen-cent increase effective January 1, 1949, there had been no increases in 1947 or 1948, so the

thirteen-cent increase probably included an overdue 1948 increase.

The absence of any large group of employees in the community doing the same or similar work and exhibiting like or similar skills under the same or similar working conditions requires that relatively greater weight be given to wage rates and working conditions in the rest of the transit industry. We find that in midwestern cities (with populations exceeding 250,000, wages have increased 11.71 cents an hour on the average since January, 1948, and in all cities in the United States exceeding 500,000 population represented by the Amalgamated, wages have increased 11.38 cents an hour during that period.

Comparison of wage rates or other conditions of employment of employees of the company with those prevailing generally in Milwaukee shows that the 1946 average for production workers was \$1.12 per hour as against \$1.13 for operators. In January, 1949, production workers received \$1.473 and operators \$1.36. An increase of approximately twelve cents per hour would, therefore, be necessary to restore the 1946 relationship.

If we examine wage increases of Milwaukee production workers since May, 1948, we find an increase to January, 1949, of 8.9 cents per hour.

In making a wage determination we are also confronted with the question of whether an increase shall be in the form of an equal number of cents per hour or of a percentage of present



wages. We believe that a percentage increase will be more equitable in the situation here involved. We have two reasons for this conclusion.

The first reason is that the many and substantial increases granted during the recent period of inflation have seriously narrowed the gap between men in the lower pay categories and those in the higher brackets, and if there is any valid reason for pay differentials, it follows that differentials cannot be too seriously narrowed without creating inequities.

The second reason for a percentage increase is that a substantial portion of the increase herein granted is compensatory for loss of the overtime guaranty. We find that the Company will, after the transitional period, realize a substantial saving, and the increase herein granted includes compensation to employees for this saving. Higher paid employees obviously lose more in cents per hour when overtime is reduced than do lower paid employees. A "compensatory" increase of an equal number of cents per hour, which gives one man part of the saving made on another, would therefore be highly unfair.

- 170 After giving full consideration to all of the factors mentioned in Section 111.57 of the Statutes, as well as to other related considerations, we find that a fair and equitable wage adjustment for the employees in the bargaining unit would be accomplished by a general wage and salary increase of 9 per cent. Half of such increase shall be made retroactive to January 1,



1949, and the balance shall become effective on July 1, 1949.

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## DECISION AND ORDER.

Upon the foregoing findings, it is ordered:

### General.

1. That all the Articles, Sections, Subsections and provisions of the agreement between the parties signed on June 11, 1948, continue to control the relations between the parties except as herein specifically provided otherwise. Provided, however, that this order shall be in effect until one (1) year from the date of its filing with the Clerk of the Circuit Court of Milwaukee County unless changed by mutual consent or agreement of the parties.

2. That any provision, or part thereof, of the old agreement which is not consistent with any part of the new provisions hereinafter prescribed shall be superseded by the new provision.

3. Any dispute involving the application of this order or respecting the integration of its provisions into the new agreement shall be settled through the grievance procedure.

4. The terms of the overtime provisions established in the old agreement and applicable to the various departments or job classification subject to the agreement shall continue in effect until June 30, 1949. The new provisions herein specified shall be effective commencing July 1, 1949.

5. The clauses in the agreement providing in effect that the employees shall take off on their scheduled "off-days" shall not be effective until September 15, 1949.

**"Exhibit A" Amendments.** *L*

Article XIII, Section C, Subsection 12, shall read:

All trainmen and bus drivers holding regular runs shall be allowed two days off each week.

Off-day schedules shall be discussed with the Association before they are put into effect and shall be subject to the grievance procedure.

Article XIII, Section C, Subsection 14, shall read:

The spread of all paid-for time in a day's work shall be limited to the following provisions which shall be applied to the entire system.

(a) 55% of all runs must be completed within nine and one-half ( $9\frac{1}{2}$ ) hours.

(b) Not over 12% of the total runs shall exceed twelve and one-half ( $12\frac{1}{2}$ ) hours, and no run shall exceed thirteen (13) hours.

Article XIII, Section C, Subsection 15, shall read:

One piece runs shall not be less than 50 per cent of the total regular runs except during winter when they shall not be less than forty-five (45) per cent. Such runs shall be proportioned among the stations as equally as practicable.

172 Article XIII, Section C, Subsection 20, shall read:

All trainmen and bus men shall be guaranteed at least the number of paid-for hours in their run when they:

(a) Are removed temporarily from their regular run for use on some other Company work.

(b) Practice for a different job.

(c) Are required to report to the Training Division.

Article XIII, Section C, Subsection 42 shall read:

The Company shall furnish the Association with copies of work assignment sheets, headway sheets and individual run schedules (time paddles) a reasonable time prior to picking.

Article XIII, Section G, Subsection 59, shall be modified to change the monthly rates to 40/51ths of the figures stated and shall repeat the hourly equivalent figures, and shall further read as follows:

The above monthly rates are straight time rates based on forty (40) hours of work per week.

Station clerks, supply car clerks, and bulletin clerks shall be paid overtime for all time worked in excess of eight hours (paid-for time) per day or forty hours per week (exclusive of allowances for sick leave, vacations or premium pay for holidays). There shall be no duplication of the daily and weekly time and one-half rate figured on the above basis.

Station clerks working regular late night shifts, starting at or about 9:30 P. M. will be paid a night shift differential of two (2) cents per hour for all hours worked on such shifts.

Clerks shall be required to take at least three (3) days off each two (2) weeks. Scheduling of days off shall be arranged at each station and shall be mutually agreed to between the Division Superintendent and the Association.

Part-time clerks, when taking the place of regular station clerks, shall be paid one dollar, forty-five cents (\$1.45) per hour, and when taking the place of the bulletin clerk, one dollar, forty-nine and one-half cents (\$1.495) per hour.

Seniority shall be as per amended agreement dated July 2, 1945, or any subsequent agreements.

(The above rates shall be subject to the general increase granted.)

Article XIV, Section A, Subsection 70, shall read:

An additional twenty-five (25) cents per hour shall be paid to employees who work with freshly creosoted ties or ties and blocks soaked with oil or naphtha solution.

Article XIV, Section A, Subsection 71, shall read:

173 Men doing paving work shall be allowed five (5) cents additional per hour in addition to their regular rate while doing such work. Men operating concrete breakers and jack hammers shall be allowed five (5) cents additional per hour above their regular rate while doing such work.

Article XIV, Section A, Subsection 71 (a), shall read:

A ten (10) cent per hour premium shall be paid to truck drivers while operating four-wheel-drive truck on ice cutting or grading work.

Article XIV, Section C, Subsection 85, and Article XVI, Section C, Subsection 138, shall both read as follows:

The Company shall provide safe, healthful working conditions at all times. Whatever equipment, machinery, etc., which the Company provides, shall be in good working condition. The Association agrees that its members will use all necessary safeguards furnished and will work safely at all times.

Article XIV, Section D, Subsection 92, shall be modified to change the monthly rates to 40/44ths of the figures stated and shall substitute the third year figures for Section Foreman A and B for the second year figures respectively, said second year figures to be deleted; and such subsection to be otherwise unchanged except for the substitution of the following:

\*Note: The monthly rates stated above for Yard Foreman and Section Foreman are the straight time rates for a forty (40) hour week. Yard Foreman and Section Foreman shall be paid overtime for all time worked in excess of forty (40) hours per week, and the hourly rate, for purposes of computing overtime, is to be determined by applying twenty-three (23) per cent to the employee's total monthly earnings and dividing the product by the regular scheduled hours, i. e., forty hours per week.

The subsection is otherwise unchanged. It should be particularly noted here that acceleration and recomputation of monthly pay do not exempt these figures from the general increase herein granted. -

Article XIV, Section E, Subsection 100, shall be revised as follows:

The words, "forty-four (44)", are deleted, and the words, "forty (40)" substituted. The language is otherwise to remain unchanged.

Article XV, Section C, Subsection 119, shall be revised as follows:

The words, "forty-two (42)", are deleted wherevèr they appear, and the words, "forty (40)", substituted. The language is otherwise to remain unchanged.

Article XVI, Section A, Subsection 134, shall be revised to the following extent:

All monthly rates therein set forth shall be reduced one-eleventh ( $1/11$ th), and after such reduction, shall constitute the straight time rates based on a forty (40) hour work week. The "Note" provision is deleted. Such revised rates shall, of course, be subject to the general increase herein granted.

Article XVI, Section D, Subsection 140, shall read:

174 Employees receiving the monthly rate shall be paid overtime for all time worked in excess of eight (8) hours per day and forty (40) hours per week, but there shall be no duplication of the daily and weekly overtime.

The Company shall not be required to furnish work in excess of straight time hours when employment conditions permit the elimination of overtime.

Article XVI, Section D, Subsection 141, shall read:

Employees shall, so far as practicable, be allowed two (2) days off per week.



Article XIX, Subsection 146, shall be revised as follows:

The words, "forty-eight (48)", are deleted, and the words, "forty-five (45)", substituted. Except for this change, the subsection is unchanged.

Article XXII, Subsection 158, is deleted.

Article XIII, Section D, Subsection 35, shall read:

Extra men shall be given at least sixty-seven (67) paid hours of work for each two-week pay roll period, allowing no more than two (2) days off per week.

#### **General Wage Amendment.**

All hourly and monthly employees represented by the union are granted a nine (9) per cent wage increase, half of which shall be effective retroactively to January 1, 1949, and the balance shall be effective July 1, 1949, and thereafter. Computation shall be based on the hourly rate of employees paid on an hourly basis and the monthly rate of the monthly employees, and fractions of a cent shall be ignored unless they constitute a half ( $\frac{1}{2}$ ) cent or more, in which case the full cent shall be paid. All wage tables contained in the agreement of June 11, 1948, as amended by this order shall be amended by the substitution of figures nine (9) per cent higher, adjusted to the nearest full cent as hereinbefore provided.

### **Interpretation.**

Any conflict between any specific provision of the June 11, 1948, agreement as herein modified and the general intent of this order shall be decided in such a way as to give effect to the general intent.

Dated April 9th, 1949.

Board of Arbitration,

J. Martin Klotzsch,

H. Herman Rauch,

Carl J. Ludwig,

Chairman.

175 Cover.

176 Cover.

177 **Evidence Taken Before Board of Arbitration.**

177-190 Index and Witnesses.

191 Mr. Previant: I have some affidavits here I want to file. This Affidavit is supplementary to some other Affidavits which have already been filed in this matter.

Chairman: Are both sides ready?

Mr. Prosser: We are ready.

Mr. Oliver: Mr. Chairman, this matter to  
192 which Mr. Previant referred is something that should be taken care of as the hearing opens.

Mr. Chairman: You want that statement of yours in the record, Mr. Previant?

Mr. Previant: Yes, I would like it to be a part of the record. It is in the nature of a supplementary affidavit in support of various objections which we have filed prior to the hearing today and objecting to the proceedings which we want to make part of the record here. And before we proceed today——

Mr. Rauch: Do you have just one copy?

Mr. Previant: I will complete the copies and give one to each member of the Board. Before we proceed today we would like to renew again, and make clear, our position for the purposes of the record, and that is that we are not participating in these proceedings voluntarily, but under the duress and coercion of the Wisconsin Law; that we are participating without prejudice to and without waiver of the various motions and objections which have heretofore been filed in this cause from the first date that the Wisconsin Employment Relations Board attempted to assert jurisdiction over the matter.

227-     **Testimony and Evidence before the Board of**  
1833 **Arbitration.**

1834     **Cover.**

1835     **Admission of Service.**

1836-

1837

**SUPPLEMENTAL AFFIDAVIT OF  
GEORGE KOECHEL**

**Submitted at First Meeting of Board  
of Arbitration.**

State of Wisconsin, }  
Milwaukee County. } ss.

George Koechel, being first duly sworn, on oath deposes and says that he is President of Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, affiliated with the American Federation of Labor (hereinafter referred to as the Union), and that he makes this Supplemental Affidavit on behalf of such organization and the members thereof, being first duly authorized so to do;

That this affidavit is supplementary to the affidavits previously filed in this cause on the 5th day of January, 1949, and on the 3rd day of February, 1949;

That he repeats and reaffirms the allegations contained in such affidavit and incorporates the same herein;

That on February 9th, 1949, the Union filed with the National Labor Relations Board a charge alleging that the Milwaukee Electric Railway and Transport Company had committed and was continuing to commit unfair labor prac-

tices under the provisions of Sections 8 (a) (1) and (5) of the National Labor Relations Act based in part upon the conduct of the Company previously set forth in the affidavits which have already been filed in this cause; that the National Labor Relations Board has assumed jurisdiction over such matters and at the present time is conducting an investigation into such matter.

George Koechel.

Subscribed and sworn to before me this 1st day of March, A. D. 1949.

David Previant,  
Notary Public, Milwaukee County,  
Wisconsin.

My commission expires May 7, A. D. 1950.

1843-1844

### **JUDGMENT.**

(Venue and Title Omitted.)

The above entitled matter having come on for hearing on the 2nd day of February, 1950, before the court without a jury, upon petition to review and set aside all orders, decisions and awards of the Wisconsin Employment Relations Board and the respondents Carl Ludwig, H. Herman Rauch and Martin Klotsche in the proceedings commenced by the petition to the respondent board on December 31, 1948, for appointment of a conciliator; and the respondent board having caused return to be made of the entire record

in said matters; and the petitioners appearing by David Previant, and F. H. Prosser appearing for the respondent Milwaukee Electric Railway & Transport Co., and Beatrice Lampert appearing for the other respondents; and the court having heard the arguments and considered the briefs of counsel, and being fully advised in the premises; and having taken the matter under advisement, and having, on the 17th day of February, 1950, filed its decision and direction for denial of the petition,

Now, Therefore, on motion of Beatrice Lampert,

It Is Ordered, Adjudged and Decreed that the petition in the above entitled action, to review and set aside all orders, decisions and awards of the Wisconsin Employment Relations Board and Carl J. Ludwig, J. Martin Klotz and H. Herman Rauch pursuant to petition to said board on December 31, 1948, for appointment of a conciliator, be and the same is hereby denied and dismissed.

Dated February 23, 1950.

By the Court:

Roland J. Steinle,  
Circuit Judge.

1845 Cover.

1846 Notice of Entry of Judgment.

1847-1848 Judgment.

1849 Cover.

1850-1852 Notice of Appeal and Waiver of Undertaking.

1853 Cover.

1854 Return on Appeal to Supreme Court.



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[fol. 231] Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Ninth day of August, A. D. 1949.

Present: Hon. Marvin B. Rosenberry, Chief Justice, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. Henry P. Hughes, Hon. John E. Martin, Hon. Grover L. Broadfoot, Hon. Timothy Brown, Justices.

Be it remembered that heretofore, to-wit: on the twenty-second day of March in the year of our Lord One Thousand Nine Hundred and Fifty came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 998, George Koechel and Charles Brehm, individually and in their representative capacity, by their attorneys and filed in said Court their certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Milwaukee County, in said State; in words and figures following, that is to say:

[fol. 232] STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE  
COUNTY

Filed Mar. 3, 1950. Fred J. Jaeger Clerk.

Case No. 220-324

NOTICE OF APPEAL

Filed Mar. 22, 1950. Arthur A. McLeod, Clerk of Supreme  
Court, Madison, Wis.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND  
MOTOR COACH EMPLOYEES OF AMERICA, Division 998,  
George Koechel and Charles Brehm, individually and in  
their representative capacity, Petitioners-Appellants

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING,  
Henry Rule and J. E. Fitzgibbon, individually and as  
Members of the Wisconsin Employment Relations Board;  
Carl Ludwig, H. Hermán Rauch, and Martin Klotzsche,  
individually and as members of a Board of Arbitration,  
and The Milwaukee Electric Railway & Transport Com-  
pany, a Wisconsin corporation, Respondents

To Thomas E. Fairchild, Attorney General; Stewart G.  
Honeck, Deputy Attorney General; Beatrice Lampert,  
Assistant Attorney General, Attorneys for Wisconsin  
Employment Relations Board, and all other Respondents,  
excepting The Milwaukee Electric Railway & Transport  
Company; Shaw, Muskat & Paulsen, Attorneys for The  
Milwaukee Electric Railway & Transport Company and  
Fred J. Jaeger, Clerk of the Circuit Court for Milwaukee  
County.

You will please take notice that the petitioners above  
named hereby appeal to the Supreme Court of the State of  
Wisconsin from the Judgment entered in the above entitled  
matter in the Circuit Court for Milwaukee County, Wiscon-  
sin, on the 23rd day of February, A. D. 1950, and from the  
whole thereof.

Dated at Milwaukee, Wisconsin, this 3rd day of March,  
A. D. 1950.

Padway, Goldberg & Previant, Attorneys for Peti-  
tioners and Appellants.

Copy received March 3, 1950. Thomas E. Fairchild, Attorney General, Beatrice Lampert, Assistant Attorney General.

Service admitted this 3rd day of March, 1950.

Fred J. Jaeger, Clerk of Circuit Court, Milwaukee County, Wis.; By Ray L. Dundas, Deputy Clerk.

[fol. 233] STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

Filed Mar. 3, 1950. Fred J. Jaeger Clerk.

Case No. 220-324

WAIVER OF UNDERTAKING

Filed Mar. 22, 1950. Arthur A. McLeod, Clerk of Supreme Ct. Madison, Wis.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, Division 998, George Koechel and Charles Brehm, individually and in their representative capacity, Petitioners-Appellants

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, Henry Rule and J. E. Fitzgibbon, individually and as Members of the Wisconsin Employment Relations Board; Carl Ludwig, H. Herman Rauch, and Martin Klotsche, individually and as members of a Board of Arbitration, The Milwaukee Electric Railway & Transport Company, a Wisconsin corporation, Respondents

The undersigned herewith waive the filing and serving of an undertaking for costs on appeal in the above entitled action as required by the Wisconsin Statutes.

Dated March 3, A. D. 1950.

Thomas E. Fairchild, Attorney General; Beatrice Lampert, Assistant Attorney General, Attorneys for Respondents, Excepting The Milwaukee Electric Railway & Transport Company; Shaw, Muskat & Paulsen, Attorneys for Respondent, The Milwaukee Electric Railway & Transport Company.

[fol. 234] And afterwards to-wit on the 2nd day of May, A. D. 1950, the same being the 63rd day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

Milwaukee Circuit Court, Opinion by Justice Broadfoot

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, Division 998, George Koechel and Charles Br hm, individually and in their representative capacity, Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, Henry Rule and J. E. Fitzgibbon, individually and as Members of the Wisconsin Employment Relations Board; Carl Ludwig, H. Herman Rauch, and Martin Klotsche, individually and as members of a Board of Arbitration, and the Milwaukee Electric Railway & Transport Company, a Wisconsin corporation, Respondents

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed, with costs of the Milwaukee Electric Railway & Transport Company against the said appellants taxed at the sum of One Hundred Twenty-two Dollars and Fifty Cents (\$122.50).



AUGUST TERM, 1949

STATE OF WISCONSIN: IN SUPREME COURT

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND  
MOTOR COACH EMPLOYEES et al., Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al.,  
Respondents

Appeal from a judgment of the circuit court for Milwaukee county: ROLAND J. STEINLE, Circuit Judge. *Affirmed.*

On December, 31, 1948, the Milwaukee Electric Railway and Transport Company (hereinafter referred to as the company) filed a petition with the Wisconsin Employment Relations Board (hereinafter referred to as the board) for the appointment of a conciliator to attempt to effect a settlement of a labor dispute between the company and the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, A. F. of L. (hereinafter referred to as the union.)

The petition alleged that a general labor agreement between the company and the union was due to expire at midnight, December 31, 1948; that the parties had at [fol. 236] tempted in good faith to negotiate the terms of an agreement for the year 1949, but had not been able to reach an agreement thereon; that the collective bargaining negotiations had reached an impasse and stalemate; that the parties will be unable to effect a settlement of their dispute without the intervention, aid and assistance of the conciliation and/or arbitration processes and procedures provided for in secs. 111.50 through 111.65 of the Wisconsin statutes, and that the company believed that the dispute, if not settled, will cause, or is likely to cause, an interruption of essential public passenger transportation services.

The board ordered a public hearing on the petition to be held on January 5, 1949. The union appeared and moved for the dismissal of the petition and that all further proceedings be terminated because the sections of the statute referred to in the petition were unconstitutional and void. The board overruled the union's motions and appointed a



conciliator. Thereafter the parties met with the conciliator appointed by the board. The union at said meeting, and at subsequent meetings with the conciliator and the arbitrators thereafter appointed, reiterated its objections to the procedure for the purpose of preserving its rights in the matter and stating that its appearances were to be without prejudice to its objections to the validity of the law.

On January 31, 1949, the conciliator reported to the board that he had been unable to effect a settlement of the dispute within the time allotted. The board thereupon [fol. 237] appointed a panel of five persons and directed that the parties appear before the board on February 3, 1949, for the selection of three members of the panel to act as a board of arbitration. The board of arbitration held hearings and on April 9, 1949, issued its decision and order, which was filed with the clerk of the circuit court for Milwaukee county on April 11, 1949. The union, together with George Koechel, its president, and Charles Brehm, a member of the bargaining committee of the union, individually and in their representative capacities, then petitioned the circuit court for Milwaukee county to review and set aside all orders of the board and of the board of arbitration, composed of Carl Ludwig, H. Herman Rauch and J. Martin Klotsche. The board and its individual members, the three arbitrators, and the company were named as respondents in the petition. From a judgment of said circuit court dated February 23, 1950, denying the relief sought in the petition, the petitioners appeal.

[fol. 238] BROADFOOT, J. This case and the case of *Wisconsin Employment Relations Board v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, et al*, ante p. —, N. W. (2d) —, were argued together upon the appeal. With one exception the contentions of the appellants in this case were raised in the companion case and were determined therein.

The remaining contention is that the statutes involved are in violation of Art. VII, sec. 16 of the Wisconsin constitution which reads as follows:

“The legislature shall pass laws for the regulation of tribunals of conciliation, defining their powers and duties. Such tribunals may be established in and for

any township, and shall have power to render judgment to be obligatory on the parties when they shall voluntarily submit their matter in difference to arbitration; and agree to abide the judgment or assent thereto in writing."

The appellants contend that the statutes under which the proceedings were held (secs. 111.50 through 111.65) create tribunals of conciliation and arbitration within the meaning of said constitutional provision; that tribunals created under said provision can only render a binding judgment when the parties have voluntarily submitted their matters in difference; and it follows that said statutes are therefore violative of the constitutional provision as they provide for compulsory arbitration.

In *Borgnis v. Falk*, 147 Wis. 327, 133 N. W. 209, it was pointed out that this section of the constitution appears in Art. VII dealing with the judiciary; that administrative [fol. 239] agencies are not courts, and this provision therefore is not applicable to orders and awards of administrative agencies. For the same reasons we hold that secs. 111.50 through 111.65, Stats. are not violative of said constitutional provision.

*By the Court.*—Judgment affirmed.

[fol. 240] STATE OF WISCONSIN, IN SUPREME COURT, AUGUST  
TERM, 1949

No. 235

Filed May 20, 1950. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND  
MOTOR COACH EMPLOYEES OF AMERICA, Division 998,  
George Koechel and Charles Brehm, individually and in  
their capacity, Petitioners-Appellants,

VS.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING,  
Henry Rule and J. E. Fitzgibbon, individually and as  
Members of the Wisconsin Employment Relations Board;  
Carl Ludwig, H. Herman Rauch, and Martin Klotzsche,  
individually and as members of a Board of Arbitration  
and The Milwaukee Electric Railway & Transport Com-  
pany, a Wisconsin Corporation, Respondents

#### MOTION FOR REHEARING

Now come the Appellants above named, and respectfully  
move this Honorable Court to grant a rehearing in the  
above entitled case, on the grounds and for the reasons to  
be assigned in the printed brief which will be filed in support  
hereof.

Dated at Milwaukee, Wisconsin, May 16th, 1950.

Padway, Goldberg & Previant, Attorneys for Appel-  
lants.

Admission of Service.

Due and personal service of copy of Motion for Rehearing  
by Appellants, in the above entitled action, is hereby ad-  
mitted this 17 day of May, A. D. 1950.

Beatrice Lampert, Attorney for Wisconsin Employ-  
ment Relations Board, and for Members of a Board  
of Arbitration.

Received copy of within this 16 day of May, 1950.

Shaw, Muskat & Paulsen, Attorneys for Deft.  
T. M. E. R. & T. Co.

[fol. 241] And afterwards to-wit on the 30th day of June, A. D. 1950, the same being the 81st day of said term, the motions were denied in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY  
AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998,  
et al., Appellants

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND  
MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, et al.,  
Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al.,  
Respondents

The Court being now sufficiently advised of and concerning the motions of the said appellants for a rehearing in these causes, it is now here ordered that said motions, be, and the same are hereby, denied with \$25.00 costs in each case.

Clerk's Certificate to foregoing transcript omitted in printing.

(9451)

[fol. 241] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1950

No. 330

ORDER ALLOWING CERTIORARI—Filed November 6, 1950

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 302, *St. John et al. vs. Wisconsin Employment Relations Board et al.* and No. 329, *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America et al. vs. Wisconsin Employment Relations Board.*

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1334)

**LIBRARY**  
**SUPREME COURT, U. S.**

Office - Supreme Court, U. S.  
**FILED**

**SEP 22 1950**

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1950.**

No. **330**

**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
DIVISION 998, GEORGE KOECHER and CHARLES BREHM,  
Individually and in Their Representative Capacity,  
Petitioners,**

**vs.**

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.  
GOODING, HENRY RULE and J. E. FITZGIBBON, Individ-  
ually and as Members of the Wisconsin Employment Rela-  
tions Board; CARL LUDWIG, H. HERMAN RAUCH and  
MARTIN KLOTSCH, Individually and as Members of a  
Board of Arbitration, and THE MILWAUKEE ELECTRIC  
RAILWAY & TRANSPORT COMPANY, a  
Wisconsin Corporation,  
Respondents.**

**PETITION FOR A WRIT OF CERTIORARI**

**To the Supreme Court of the  
State of Wisconsin.**

**DAVID PREVIAINT,  
511 Warner Theatre Building,  
212 West Wisconsin Avenue,  
Milwaukee 3, Wisconsin,  
Counsel for Petitioners.**

**ALFRED G. GOLDBERG,  
SAUL COOPER,  
511 Warner Theatre Building,  
212 West Wisconsin Avenue,  
Milwaukee 3, Wisconsin,  
Of Counsel.**

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# **SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1950.**

No. ....

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**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
DIVISION 998, GEORGE KOECHEL and CHARLES BREHM,  
Individually and in Their Representative Capacity,  
Petitioners,**

**vs.**

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.  
GOODING, HENRY RULE and J. E. FITZGIBBON, Individ-  
ually and as Members of the Wisconsin Employment Rela-  
tions Board; CARL LUDWIG, H. HERMAN RAUCH and  
MARTIN KLOTSCH, Individually and as Members of a  
Board of Arbitration, and THE MILWAUKEE ELECTRIC  
RAILWAY & TRANSPORT COMPANY, a  
Wisconsin Corporation,  
Respondents.**

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## **PETITION FOR A WRIT OF CERTIORARI**

**To the Supreme Court of the  
State of Wisconsin.**

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**To the Honorable, the Justices of the Supreme Court of the  
United States:**

The above named petitioners respectfully pray that a writ of certiorari issue to review the decision of the Supreme Court of Wisconsin, entered in the above entitled case on May 2, 1950, motion for rehearing denied June 30, 1950.



## **OPINIONS BELOW.**

The opinion of the Circuit Court for Milwaukee County (R. 101-106) is unreported. The opinion of the Wisconsin Supreme Court (R. 235-237) is reported in 257 Wis. 53, 42 N. W. (2d) 477.

## **JURISDICTION.**

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

In this case the validity of certain statutes of the State of Wisconsin, to-wit: Sections 111.50-111.65, particularly Sections 111.50-111.61 thereof, and a judgment based on such statutes, is drawn in question upon the ground that such statutes and judgment, on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to:

(a) Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the Labor Management Relations Act, 61 Stats. 136; 29 U. S. C., Sections 141-197; and

(b) Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprived petitioners of liberty and property without due process of law and deprive petitioners of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all causes in the State of Wisconsin, was in favor of the validity of the statutes and judgment.

Petitioners argued before the Wisconsin Employment Relations Board (R. 124-125, 145-146, 158), before the

Board of Arbitration (R. 161), before the Circuit Court for Milwaukee County (R. 102-103, 113-114) and before the Supreme Court of the State of Wisconsin (see decision, R. 236) that Sections 111.50-111.65 of the Wisconsin Statutes and more particularly Sections 111.50-111.61, as construed, were unconstitutional and void and of no effect whatsoever because they were repugnant to the provisions of the United States Constitution referred to immediately hereinabove.

The federal question of whether the Wisconsin Statutes in question, and the judgment purportedly based on such statutes, violated the Constitution of the United States was raised, therefore, before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin held that neither the statutes nor the judgment based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the Constitution of the United States. No specific treatment of the constitutional questions was made in the opinion since this case had been argued with the companion case now before this Court on petition for a writ of certiorari, being case No. . . . ., October Term 1950. In its decision in that companion case the Court passed specifically upon the Federal constitutional questions raised. In the instant case the Court referred to its opinion in the companion case and stated:

“With one exception the contentions of the appellants in this case were raised in the companion case and were determined therein” (R. 236).<sup>1</sup>

In affirming the judgment of the Circuit Court, it necessarily affirmed that court's ruling (R. 102-103) that the statute was not in violation of the Federal Constitution.

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<sup>1</sup> The remaining contention dealt with in the opinion was based upon the Wisconsin Constitution.



Thus, the Wisconsin Supreme Court has held that the State of Wisconsin can, over the objections of employees of a public utility, compel such employees to submit a dispute over wages, hours and working conditions to an ad hoc arbitration tribunal appointed by the State, and be bound by such tribunal's determination for a period of one year; and that such procedure is not in violation of any provision of the Constitution of the United States.

### **QUESTION PRESENTED.**

Whether a State may by statute require employees of a "public utility" employer to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employees to strike.

### **STATE STATUTES INVOLVED.**

The pertinent state statutory provisions are printed in Appendix A to this petition. They may be summarized as follows:

Where a dispute arises between a "public utility employer," as defined in Section 111.51 (1), and its employees, which dispute may result in the interruption of an "essential service," as defined in Section 111.52 (2), and if the collective bargaining process has reached an impasse and stalemate which in the opinion of the Wisconsin Employment Relations Board has occurred notwithstanding good faith efforts on the part of both sides, either party to such dispute may petition the State Board to appoint a conciliator from a panel previously created by it (Section 111.54).

If the conciliator is unable to effect a settlement of the dispute, a board of arbitration is convened, which has the duty to hear and determine the dispute (Section 111.55).



Certain standards are established with which the arbitrator's decision must comply (Secs. 111.57 and 111.58).

The award of the arbitrators is filed with the Circuit Court of the County in which the dispute arose and, unless reversed upon appeal, is binding on the parties for a period of one year (Sec. 111.59). During the pendency of the arbitration process no change may be made in existing wages, hours and conditions of employment by either party without the consent of the other (Sec. 111.56).

Strikes are absolutely prohibited (Sec. 111.62).

### **STATEMENT.**

The petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the "union" or "Division 998," is an unincorporated, voluntary labor organization. It is the collective bargaining representative of all of the employees of The Milwaukee Electric Railway and Transport Company, hereinafter referred to as the employer, in its operating and maintenance departments. These departments employ approximately 2700 employees, who are engaged in supplying the employer's public passenger transportation service (R. 108-110, 130-131).

The individual petitioners are officers of the union who are acting as individual employees and as representatives of all other employees, as well as in their official capacity (R. 109).

The respondents Wisconsin Employment Relations Board and its members (hereinafter referred to as the Board) comprise an administrative agency created by Sec. 111.03, Wisconsin Statutes.

The respondent members of a Board of Arbitration were appointed pursuant to Sec. 111.55 of the Wisconsin Statutes (R. 143, 159).

The respondent, Milwaukee Electric Railway & Transport Co., is engaged in the business of furnishing public passenger transportation service by streetcar and motor bus in the City of Milwaukee and its contiguous area, including service to thousands of employees of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce or in interstate commerce. The rolling stock, equipment and material used by the employer is procured in great measure from points outside the State of Wisconsin, the total value of the rolling stock recently acquired before these proceedings being in excess of \$2,000,000. Its gross operating revenue exceeds \$16,000,000 annually and it transports in excess of 100,000,000 passengers annually. Any substantial interruption of the business of the employer as a result of a labor dispute would affect interstate commerce (R. 130-132).

The National Labor Relations Board in December, 1947, upon the insistence of the employer that the terms of the National Labor Relations Act be complied with, assumed jurisdiction over the labor relations of the employer, conducted an election among its employees represented by Division 998, and certified that Division 998 was authorized to enter into a "union security" agreement with the employer pursuant to the provisions of Section 8 (a) 3 and Section 9 (e) (R. 132).

A contract between the union and the employer covering wages and working conditions of the employees represented by the union expired December 31, 1948. More than 60 days prior to that date and in accordance with the contract and the law, the union submitted to the employer written proposals for certain specified changes in the old contract and requested a conference for the purpose of bargaining on such proposals. The employer also sent a written notice to the union, 60 days prior to December 31, 1948, stating that it was therewith terminating and cancelling said contract as of December 31, 1948 (R. 165-166).

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The parties negotiated for a new contract during November and December of 1948, but arrived at no agreement (R. 134, 166). The union offered to settle the controversy by submitting the same to a voluntary arbitration tribunal, but the employer refused such offer (R. 134).

Representatives of the Federal Conciliation and Mediation Service attempted to settle the dispute and were still attempting to do so when the jurisdiction of the state Board was invoked (R. 135).

On December 31, 1948, the company petitioned the Wisconsin Employment Relations Board, under the terms of Sections 111.54 and 111.55 of the Wisconsin Statutes, to appoint a conciliator (R. 119).

The union protested the appointment of a conciliator as well as the jurisdiction of the Wisconsin Employment Relations Board to do so, alleging, among other things, that the statutes invoked were contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States, in that they were in conflict with the Act of Congress known as the Labor Management Relations Act, 61 Stats. 136, 29 U. S. C., Sections 141-197, and also contrary to the Fourteenth Amendment to the Constitution of the United States (R. 124-130).

The union's objections were overruled and a conciliator was appointed. The union participated in the conciliation proceedings as a matter of courtesy to the conciliator, reserving, however, all objections to the validity of the statute and of the proceedings (R. 137, 142, 152).

At about this time a threatened strike of the employees was restrained, on application by the Board, in the proceedings which are the subject of a separate Petition for Writ of Certiorari filed simultaneously with the filing of the instant petition.

On the 31st day of January, 1949, the conciliator reported to the Board that he had been unable to effect a settlement within the time allotted (R. 141-143).

Accordingly, the Board proceeded to the appointment of a three-man board of arbitration, in compliance with the statutes (R. 143-144, 158). The union participated in the proceedings leading to the appointment of the arbitrators and in the proceedings before the arbitration board without waiver of or prejudice to its challenges to the validity of the law, taking the position that such participation was under the duress and coercion of the law which, by precluding the union from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection, placed in jeopardy such rights as job-security, pensions, and maintenance and improvement of hours, wages and other working conditions (R. 157-158, 164, 223).

During the proceedings leading to the appointment of the arbitrators the union challenged the good-faith efforts of the employer in attempting to arrive at a settlement of the dispute, alleging that the employer had been using the Wisconsin Statutes as a shield against its duty and obligation under federal statutes to bargain collectively and in good faith, and had been relying upon automatic invocation of the Wisconsin law to relieve it from those duties and obligations (R. 145-151, 151-154).

Prior to the introduction of evidence before the board of arbitration the union filed a charge against the employer with the National Labor Relations Board alleging violation of the National Labor Relations Act by the employer in that it had failed to bargain collectively and in good faith (R. 224-225). That matter is still pending before the National Board.

After taking evidence from the parties, the Board of Arbitration issued its decision and order which was filed,

as required by statute, with the Clerk of the Circuit Court, Milwaukee County (R. 162-222).

The union duly filed a petition for review with the Circuit Court for Milwaukee County, in which it attacked the entire proceedings before the Wisconsin Employment Relations Board and the Board of Arbitration on the principal ground that the statutes under which the proceedings were conducted were null and void because in violation of the Constitution of the United States and the State of Wisconsin.

On February 17, 1950, the Circuit Court issued its memorandum opinion sustaining the validity of the statutes (R. 101-106). Judgment was accordingly entered on February 23rd, 1950 (R. 225-226).

On appeal to the Wisconsin Supreme Court, judgment was affirmed (R. 237); rehearing was denied (R. 239).

### **SPECIFICATION OF ERRORS TO BE URGED.**

The Supreme Court of the State of Wisconsin erred:

1. In holding that Sections 111.50-111.65 were not in conflict with Sections 7 and 13 (29 U. S. C., Secs. 157 and 163) of the National Labor Relations Act, and, therefore, not in violation of Article I, Section 8, and Article VI of the Constitution of the United States.

2. In holding that Sections 111.50-111.65 were not in violation of the Fourteenth Amendment to the Constitution of the United States.

3. In affirming the judgment of the Circuit Court of Milwaukee County, dismissing petitioners' action to set aside all orders, decisions and awards of the Wisconsin Employment Relations Board and the Board of Arbitration.



## **REASONS FOR GRANTING THE WRIT.**

This case is a companion case to Case No. ...., October Term, 1950, in which a Petition for Writ of Certiorari has been filed simultaneously with the instant Petition. Both cases arose out of the same dispute and involve the same statute and the same question of law. Case No. .... grows out of the issuance of an injunction based upon the provisions of the state law making it a crime for public utility employees to engage in concerted strike activities. This case grows out of the attempt on the part of the state to compel the parties to the dispute to submit such dispute to an arbitration tribunal appointed by the state. The reasons for the granting of the Writ, therefore, are virtually the same in both cases. Rather than burden the court with repetition of the reasons for granting the Writ in this petition, petitioners will limit their argument herein to those which are peculiar to the arbitration provisions of the law.

### **I.**

**The Law Is Contrary to the Provisions of Article I, Section 8, and Article VI of the Constitution of the United States Because Repugnant to and in Conflict With the Provisions of the Labor Management Relations Act, 1947, 61 Stats. 136.**

In the instant case the employer and its employment relations are clearly within the scope of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Supp. II, 141-197, and subject to the jurisdiction of the National Labor Relations Board (R. 120-132). **National Labor Relations Board v. Baltimore Transit Company**, 140 F. 2d 51 (C. A. 4, 1944), cert. den., 321 U. S. 796. Such jurisdiction is conclusively demonstrated in this case since, in

December, 1947, the National Labor Relations Board actually assumed jurisdiction over the employer and its operations, conducted an election pursuant to the terms of the Labor Management Relations Act and certified that the petitioning union had successfully complied with Section 8 (a) (3) of the Act relating to union security elections (R. 132).

Additionally, prior to the convening of the Arbitration Board, the union filed charges against the employer with the National Labor Relations Board alleging that in connection with the dispute between the parties the employer had committed and was continuing to commit unfair labor practices in violation of the federal law in that it was not bargaining in good faith with the union. These charges are still pending before the Board (R. 224). Representatives of the federal mediation and conciliation service have also attempted to bring about the settlement of the dispute (R. 134-135).

Since the business of the employer is such that its labor relations are covered by the National Act, and since the National Board had previously assumed jurisdiction over such relationship, the principle that the state law must yield where there is conflict or where the federal congress has pre-empted the field becomes directly applicable. **Allen Bradley Local Union 1111, etc. v. Wisconsin Employment Relations Board**, 315 U. S. 740; **Hill v. Florida**, 325 U. S. 538; **Bethlehem Steel Company v. New York State Labor Relations Board**, 330 U. S. 767; **LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board**, 336 U. S. 18; **Plankinton Packing Company v. Wisconsin Employment Relations Board**, 338 U. S. 953; **International Union of United Automobile, Aircraft and Agricultural Workers of America, C. I. O., etc., et al., v. O'Brien** (Case No. 456, October Term, 1949).



The conflict in the instant case arises out of the compulsory arbitration provisions of the state law and Section 7 of the National Labor Relations Act, as well as the general scheme and pattern of such Act.

Section 7 provides as follows:

**"Rights of Employees.**

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

The leading features of the state law which petitioners claim conflict with this national policy are: (a) compulsory arbitration, as provided in Sections 111.57-111.60, Wisconsin Statutes, and (b) prohibition, under penalty and by injunctive process, of concerted quitting of work by employees in furtherance of their wage and working conditions demands (Secs. 111.62-111.63).

In view of the legislative declarations of separability in the state law (Section 111.65), this petition is confined to the compulsory arbitration features separately from the prohibition on strikes, although it is obvious that the two features are inherently interrelated and intended to be mutually compensatory.

A. The threat of compulsory arbitration created by statute, in advance of and during negotiations between employer and employees, destroys the integrity and reality of the collective bargaining process; the committees of the Eightieth Congress which reported the bills that became the Labor Management Relations Act, 1947 (H. R. 3020 and S. 1126), studied and deliberately rejected proposals for compulsory arbitration in favor of retention of a national policy of collective bargaining. ◊

The practice of collective bargaining, as it has developed historically, and as it is protected by Section 7 of the Federal Labor Act, necessarily excludes the subjecting of the participants to a threat (or promise), even before the parties sit down to negotiate, of a governmental decision concerning wages and working conditions if the parties disagree.

If the alternative to a stalemate in negotiations is the right of the parties to obtain the decision of a tribunal as to the disputed terms, then the process of negotiation is, from its very inception, **not a bargaining for services, but a compromise of the hazards of the tribunal's decision.** In such a situation the resulting compromise—if there is a compromise rather than a resort to the tribunal—is not a result of a free bargain for the employees' services, and does not represent the fair value which could be obtained therefor by genuine collective bargaining.

Among the findings set forth by Congress in Section 1 of the Labor Management Relations Act of 1947 is included the finding that the inequality of bargaining power of employees who do not possess full freedom of association, or actual liberty of contract, burdens and affects the flow of commerce and tends to aggravate a recurrent business depression by depressing wage rates and purchasing power of wage earners in industry. The public policy of the

United States is declared to be, in Section 1, to eliminate these and other stated obstructions to commerce

“ \* \* \* by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

Obviously, the state has no power to supply a different and debated substitute for the process of full and free collective bargaining as prescribed by Congress for the national economic health, even though the state legislature may believe its substitute to be just as good for the workers involved, and better for the rest of the population, than the remedy prescribed by Congress. The remedy prescribed by Congress in Section 7 includes, as a necessary, although sometimes bitter, ingredient, the ultimate right to strike, because without it there cannot be genuine collective bargaining.

In the Eightieth Congress, during which the operation of the National Labor Relations Act (the Wagner Act, enacted in 1935) was subjected to great criticism, and during which that Act was amended in many important respects by the Labor Management Relations Act, 1947, proposals were made and studied for legislation to modify the collective bargaining process by substituting for the right to strike or lockout, a national policy of compulsory arbitration in public utility and other important industries; but such proposals were rejected.

The Senate Committee on Labor and Public Welfare, headed by Senator Taft, made a report, accompanying Bill S. 1126. This Bill, with Bill H. R. 3020, reported by the House Committee on Education and Labor, headed by

Representative Hartley, became the Labor Management Relations Act of 1947. In the Senate report the following statement appears:

"In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. In our judgment, while none of the suggestions is completely devoid of merit, the experience of the Federal Government with such devices has been such that we do not feel warranted in recommending that any such plans become permanent legislation."

(Senate Report No. 105 on Bill No. S. 1126; Legislative History, L. M. R. A. 1947, at page 419, Gov't Prtg. Office.)

Before the House Committee on Education and Labor which reported Bill H. R. 3020, the then Secretary of Labor (Lewis B. Schwellenbach) testified on March 11, 1947, as follows:

**"Compulsory arbitration is the antithesis of free collective bargaining. Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminates free collective bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretence of bargaining in anticipation of a more favorable award from an arbitrator than would be realized through their own efforts. The net result would be a weakening of free bargaining and an increasing reliance on the compulsory arbitration procedures, and it is obvious that with the growth of such**

an attitude, the use of conciliation and mediation procedures would decline concurrently. Conciliation and mediation are instruments of free collective bargaining, aids to the parties in arriving at voluntary and mutually acceptable settlements. Compulsory arbitration would discourage their use in the same degree that it would lessen the inclination to bargain freely in arriving at settlements in labor disputes" (quoted in Legislative History, page 392). (Emphasis ours.)

Senator Taft, co-author of the Bill and its manager on the floor of the Senate, upon consideration of Bill S. 1126, on April 23, 1947, pointed out that the enactment of legislation for compulsory arbitration would interfere with the genuine practice of collective bargaining. He told the Senate (93 Cong. Rec. 3835):

"We did not feel that we should put into the law, as a part of the collective bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided" (93 Congressional Rec. 3951-3952; Legislative History, page 1008).

A further statement was made by Senator Taft on consideration of amendments to Bill S. 1126 (93 Cong. Rec. 5116):

"The bill does not provide for compulsory arbitration. The cases in Australia cited by the Senator from Kentucky occurred because labor there secured such a



stranglehold, if you please, through statutes and otherwise on the economy of Australia, that finally the country was driven to compulsory arbitration, and, of course, it failed. Our bill does not provide for compulsory arbitration. It seeks to reduce the power of certain unions so that when the parties come to the collective bargaining table there will be free collective bargaining in which each side will have the right to present its demands, but neither side will present any unreasonable demands, on the theory that they have such unreasonable power that they can enforce unreasonable demands.

**"So, Mr. President, the bill reaffirms the principle of the Wagner Act. It restores in this country the free collective bargaining today which both management and labor groups recognize must be the basis for satisfactory labor relations between employer and employee."** (Emphasis ours.)

There can really be no such thing as good faith collective bargaining under the National Act where the state provides for compulsory arbitration as a sort of rear-door through which either party may escape from its obligations and transfer its duty of making a contract to the state.

The availability of the compulsory arbitration procedure provides a release from the unremitting economic stress to stay at the give-and-take process of the bargaining table until a voluntary agreement is reached, because, instead of allowing the force of economic pressures to break a stalemate or impasse, this statute permits either of the parties to escape from the responsibility, often heavy, of making concessions.

It is respectfully submitted that compulsory arbitration in labor relations affecting commerce was deliberately rejected in the Eightieth Congress; that the intention of the Eightieth Congress, in the adoption of the 1947 amend-

ments to the National Labor Relations Act, was to retain, as a national policy in labor management relations affecting interstate commerce, the full and free processes of collective bargaining, undiluted and unimpaired by the previous restraints therein which would be created by compulsory arbitration machinery.

**B. There is also specific conflict between the State and the Federal Law as they relate to collective bargaining.**

Not only does the general scheme of compulsory arbitration embodied in the state law conflict with the federal law, but specific provisions of the Wisconsin law also demonstrate irreconcilable conflict:

1. The arbitration process of the Wisconsin law cannot be invoked by either party to the dispute, unless an impasse or stalemate occurs, in spite of good-faith collective bargaining (Section 111.54). It would appear that, conversely, if the stalemate occurs where either party has not bargained in good faith, it is the state policy to keep hands off, at least insofar as compulsory arbitration is concerned, although the prohibition against strikes still remains.

The determination as to whether or not there has been a refusal of either party to bargain in good faith is made in the first instance by the state board. However, since the employer here is subject to the federal act, exclusive jurisdiction to make such determination is vested in the National Labor Relations Board. **Plankinton Packing Co. v. Wisconsin Employment Relations Board**, *supra*.

In the instant case the petitioner in fact invoked the superior jurisdiction of the National Board to make such determination. In spite of this, the state board unlawfully assumed such jurisdiction and made such determination, primarily to compel the parties to submit to state-conducted and state-enforced arbitration.



It is also obvious that, under this provision of the Act, either an employer or a union can prevent the compensatory remedy of compulsory arbitration in lieu of strike from being invoked by refusing to bargain in good faith. Where the employer refuses to bargain in good faith, the state cannot invoke the compulsory arbitration process, the members of the union cannot strike, and the entire policy of the federal act is thereby frustrated.

2. There is also specific conflict in view of Section 111.58 of the state act which provides "that the arbitrator shall not make any award which would infringe upon the right of the employer to manage his business." The state thus removes from the area of relief which can be granted to the employee those matters over which the employer and union must bargain collectively. In the instant case this section became directly involved in connection with a union request that certain types of employees be maintained on certain shifts. The Board of Arbitration refused to grant such request, solely because of its lack of power to do so under the above quoted provision of the statute (R. 198).

The process of collective bargaining and the entering into of signed agreements incorporating the results of such bargaining must of necessity infringe in some way or other upon the right of the employer to manage his business in the absolute and unrestricted sense. Any concession made by an employer during the process of collective bargaining results in such infringement.

Under federal law any matter dealing with wages, hours or conditions of employment is a proper subject for collective bargaining, subject only to compliance with legislative regulation of the same subject. **Matter of Consumers' Research, Inc.**, 2 N. L. R. B. 57; **Matter of Timken Roller Bearing Co.**, 70 N. L. R. B. 500; **National Labor Relations Board v. Inland Steel Co.**, 170 F. 2d 247 (C. A. 7,

1948) cert. den. 336 U. S. 960. So here the state has not only relieved the employer from its duty to bargain collectively by providing the rear exit of compulsory arbitration, but at the same time has precluded the employees from attaining in the compulsory arbitration process that which they might have otherwise attained in collective bargaining.

The two examples given herein of direct conflict and inconsistency serve to underline the basic soundness of the decision which preclude the state from adopting legislation in a field which has been pre-empted, or, if not pre-empted, where federal regulation and state regulation cannot consistently stand side by side.

## II.

### **The Wisconsin Law Is in Violation of the Fourteenth Amendment to the Constitution of the United States.**

The Supreme Court of the State of Wisconsin has held that the provisions of the law do not make unlawful delegation of legislative or judicial powers in violation of the Constitution of the State. **United Gas, Coke & Chemical Workers of America, Etc., v. Wisconsin Employment Relations Board**, 255 Wis. 154, 38 N. W. (2) 692. The law, as interpreted, therefore, is in essence an attempt on the part of the legislature itself to establish wages, hours, and working conditions of the employees for a period of one year.

Previous attempts by a state to do just this were stricken down by this Court in **Wolf Packing Co. v. Court of Industrial Relations**, 262 U. S. 522, and 267 U. S. 582. In the latter case this court held that such attempted wage finding was a curtailment of the right of contract contrary to the due process clause of the Fourteenth Amendment.

In only one case did this court sustain legislative action which approaches the type of action taken by the State of Wisconsin. In **Wilson v. New**, 243 U. S. 332, the federal Congress, when confronted with a grave national emergency as a result of a threatened strike involving all railroads in the country, enacted legislation purely temporary in nature, insofar as wages were concerned, and which neither prohibited strikes, nor compelled arbitration. This court upheld the right of the Congress to establish a daily work standard in view of its paramount power in the regulation of interstate commerce, and further sustained its right to establish for a limited period, pending further investigation, a wage standard based upon such daily work standard. In the subsequent **Wolf Packing Co.** case, *supra*, the court pointed out that in the **Wilson** case, *supra*, it had gone "to the borderline" under the peculiar facts of that case. 262 U. S. 522, 544.

In the instant case Wisconsin asserts the right to define "essential service" in an all-embracing fashion, without regard to the actual facts as they exist, and to impose its own conception of adequate wages, hours and working conditions upon employees engaged in such "essential service", at the same time holding such employees to labor under such imposed condition, except for the theoretical, unreal, and practically unfeasible right of quitting such labor as an individual. It is respectfully submitted that such attempted regulation cannot stand consistently with the protection afforded by the Fourteenth Amendment to the Constitution of the United States.

### CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in the companion case of **Amalgamated Association of Street, Electric Railway and Motor Coach Em-**

ployees of America, Division 998, et al., v. Wisconsin Employment Relations Board, the petition in which has been filed concurrently with the instant petition, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID PREVIAN, <sup>o</sup>

Counsel for Petitioners.

ALFRED G. GOLDBERG,  
SAUL COOPER, <sup>g</sup>

Of Counsel.

## **APPENDIX A.**

### **Wisconsin Statutes.**

#### **SUBCHAPTER III.**

##### **Public Utilities.**

**111.50 Declaration of Policy.** It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

**111.51 Definitions.** When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat,

gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employees.

(2) "Essential service" means furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin Employment Relations Board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

**111.52 Settlement of Labor Disputes Through Collective Bargaining and Arbitration.** It shall be the duty of public utility employers and their employees in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

**111.53. Appointment of Conciliators and Arbitrators.** Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal



with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

**111.54 Conciliation.** If in any case of a labor dispute between a public utility employer and its employees, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employees are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

**111.55 Conciliator Unable to Effect Settlement; Appointment of Arbitrators.** If the conciliator so named is unable



to effect a settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

**111.56 Status Quo to Be Maintained.** During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

**111.57 Arbitrator to Hold Hearings.** (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in dispute. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The overall compensation presently received by the employees having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employees. The foregoing enumeration of factors shall not be construed as preclud-

ing the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

**111.58 Standards for Arbitration.** The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

**111.59 Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity.** The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit of the county wherein the dispute arose or where the majority of the employees involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed be-

tween the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator.

**111.60 Judicial Review of Order of Arbitrator.** Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

**111.61 Board to Establish Rules.** The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

**111.62 Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty.** It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work

stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

**111.63 Enforcement.** The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

**111.64 Construction.** (a) Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employees, where such acts would cause an interruption of essential service.



(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 **Separability.** It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereof.

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CLERK

# **SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1950.**

**No. 330.**

**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
DIVISION 998, GEORGE KOECHL and CHARLES BREHM,  
Individually and in Their Representative Capacity,  
Petitioners,**

**vs.**

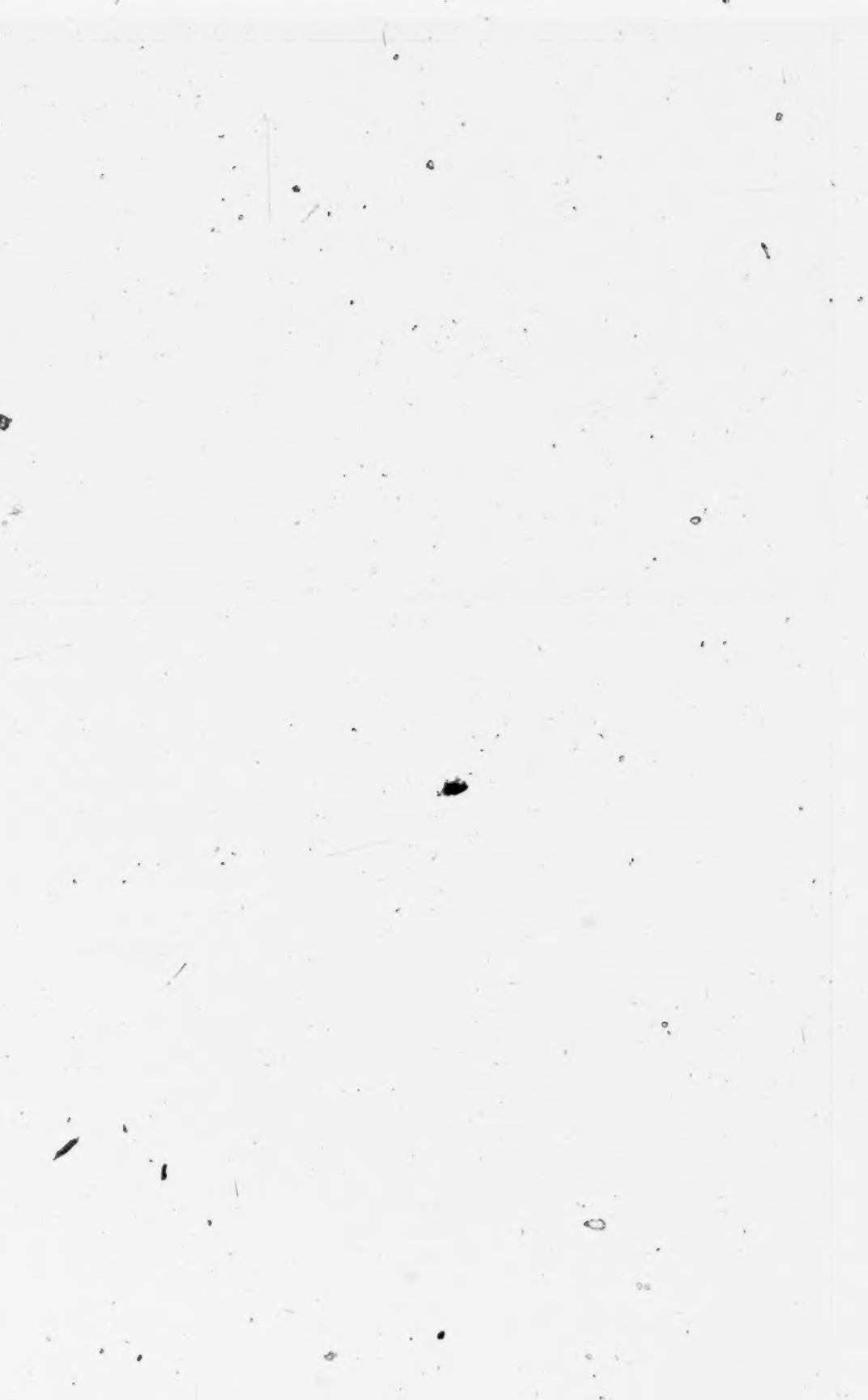
**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.  
GOODING, HENRY RULE and J. E. FITZGIBBON, Individu-  
ally and as Members of the Wisconsin Employment Relations  
Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN  
KLOTSCHKE, Individually and as Members of a Board of  
Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY &  
TRANSPORT COMPANY, a Wisconsin Corporation,  
Respondents.**

## **PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

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DIVISION 998, GEORGE KOECHEL and CHARLES BREHM,  
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Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.  
GOODING, HENRY RULE and J. E. FITZGIBBON, Individu-  
ally and as Members of the Wisconsin Employment Relations  
Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN  
KLOTSCHÉ, Individually and as Members of a Board of  
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TRANSPORT COMPANY, a Wisconsin Corporation,  
Respondents.

---

## **PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.**

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Petitioners limit this reply to the only question raised in respondents' briefs which was not covered in the Petition for Writ of Certiorari. That question is raised in the brief of respondent The Milwaukee Electric Railway & Transport Company by way of argument (and supporting affidavit) that the principal issues presented by the petition are now moot by virtue of the fact that the arbitration

award expired by force of statute on April 11th, 1950, and that just prior to such time a new collective bargaining agreement had been entered into which does not expire until September, 1951. The respondent State does not rely upon the making of a new agreement, but only upon the termination of the award by operation of statute.

I.

**The Wisconsin Supreme Court Rejected the Argument  
That the Cause Was Moot.**

At the outset it should be noted that the respondent company made a similar argument to the Wisconsin Supreme Court at the time of the original presentation of this matter to that court. It was then urged in respondent employer's brief, and oral argument submitted to the court a week before the termination date of the award, that in view of the imminent expiration of the award the matter was moot and, therefore, should not be determined. In response to this argument petitioners filed a reply brief opposing dismissal on that ground. The Wisconsin Supreme Court decided the case on its merits on May 2nd, 1950, almost one month after the statutory expiration of the award and after the signing of the new contract, thereby rejecting the argument that the matter was moot. Although the opinion of the court is silent on the matter, it can be fairly assumed that the court followed its own prior decisions that it would not declare a case moot where substantial public questions were involved. **Doering v. Swoboda**, 253 N. W. 657; **State v. Kohler**, 232 N. W. 842; **School District v. Cliffcorn**, 112 N. W. 1099.

The respondent State did not raise the question of mootness before the Wisconsin Supreme Court, and raises it now for the first time.

II.

**The Nature of the Law and the Decision of the Wisconsin Court in a Prior Declaratory Relief Proceeding Make It Necessary That the Instant Case Be Decided Under the Present Circumstances.**

In considering the question of whether a Writ of Certiorari should issue, the following sequence of events is pertinent:

The law became effective in 1947. Shortly thereafter the petitioners and another labor organization filed actions for declaratory relief to have the law declared unconstitutional. These cases came before the Wisconsin Supreme Court and that court by its decision on the 12th day of July, 1949, in the case of **United Gas Coke and Chemical Workers v. Wisconsin Employment Relations Board**, 255 Wis. 154, 38 N. W. (2) 692, held that it would not decide the federal questions in the absence of concrete application of the statute. Petitioners, therefore, were unable to get the benefit of a declaratory judgment which would clearly set forth their rights and responsibilities under the law.

While the declaratory relief proceedings were pending, the events occurred which resulted in the instant proceedings, and petitioners were required to go through the expensive and time-consuming process of compulsory arbitration so that they could receive a final determination on the merits with respect to the various challenges which they had made to the law.

In view of the previous decision of the Wisconsin Supreme Court in **United Gas, Coke and Chemical Workers** case, supra, it is apparent that the only way in which petitioners can get a final adjudication by this court is in the instant proceedings, since, under the statute, awards

of the Board of Arbitration expire after one year, and it is a practical impossibility to get the matter through the Circuit Court and Supreme Court of the state and then before this Honorable Court for final determination prior to the expiration of such year.

Thus, if the matter is held moot because of the expiration of one year or because of the entering into of another contract, pending a determination by this Court, then neither petitioners nor any other employees or union so circumstanced will have any opportunity of getting a final determination as to their rights.

In the instant case petitioners were confronted with the practical situation of the existence of a permanent injunction restraining them from striking in support of any further collective bargaining demands made either during or after the effective period of the award, a statute prohibiting such strike and requiring them to submit to compulsory arbitration, and the holding of the Wisconsin Supreme Court that the anti-strike and compulsory arbitration provisions of the law were valid and constitutional. Under those circumstances petitioners had no choice but to make the best contract that conceivably could be made pending the final determination of this court with respect to the validity of the law under which the arbitration proceedings were conducted and the permanent injunction issued. To now hold that because of the duress of these circumstances petitioners have forfeited their right to a final determination on the important constitutional questions involved clearly would not be consistent with the elementary principles of justice.



III.

**This Case Does Not Fall Within the Class of Cases in  
Which This Court Has Refused to Accept  
Jurisdiction.**

While it is true that this Court has historically been reluctant to consider causes which are moot, it does not follow that under the circumstances of this case the cause has become moot or that exceptions to the general rule are not applicable.

For example, this Court has held that expiration of individual contracts with employees which an order of the National Labor Relations Board required the employer to terminate does not render a case moot in view of the continuing obligation imposed by the order of the National Labor Relations Board. **J. I. Case Company v. N. L. R. B.**, 321 U. S. 332, 334. Similarly, neither the discontinuance of practices alleged to be in violation of regulatory legislation nor an amendment of such legislation renders a case moot. **Federal Trade Commission v. Goodyear Tire & Rubber Company**, 304 U. S. 257.

It has also been held that the passage of a new inheritance tax law relieving the petitioners in error of the burden of a judgment does not render the cause moot because of the "general and continuing nature of the legislation." **Campbell v. California**, 200 U. S. 87, 92.

And where there is a matter of great public interest involved, the cause does not become moot because of settlement of the immediate controversy which gives rise to the litigation. **United States v. Trans-Missouri Freight Association**, 166 U. S. 290, 308. In the latter case this Court stated:

"Private parties may settle their controversy at any time \* \* \*. Here, however, there has been no ex-

tinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judgment of the court under the provisions of the Act of Congress just cited.”

Subsequently, in the case of **Southern Pacific Terminal Company v. Interstate Commerce Commission**, 219 U. S. 498, 514, this rule was reiterated, the court pointing out that in the enforcement of regulatory statutes the questions involved were usually continuing ones and that short term orders under such statutes cannot be the means of defeating the jurisdiction of this court or of evading review. The court pointed out that cases of this type involved the public interest and it did not make any difference whether review was sought by the Government or by the party affected by the order.

In the last cited case this Court quoted with approval from the case of **Boise City Irrigation and Land Company v. Clark**, 131 Fed. 445 (C. A. 9th), in which case it was stated that courts would not hold controversies involving orders of public bodies moot when there was a “necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.”

In the case of **Southern Pacific Company v. Interstate Commerce Commission**, 219 U. S. 433, 452, this court held that even though a rate order had spent its force because of the passage of time it would nevertheless review such order because of the influence and effect which the rates under the expired order might have on the fixing of future rates. Similarly, in the instant case, the establishment of rates of pay and the working conditions by the order of the state can very well effect and control future negotiations between the parties since it is common practice for negotiators and arbitrators to work forward from prior

arbitration awards in determining the justice of demands made in current bargaining or arbitration processes.

As has been suggested in respondents' brief, and in the petitions filed in the instant case and its companion case No. 329, the provisions of the law relating to compulsory arbitration and to prohibition of strikes are inter-related and should be considered together. The permanent injunction which has been entered is a continuing one, and the validity of that injunction must be determined. The related question, therefore, should be determined at the same time.

It must be remembered that no challenge has been made in the instant proceedings to the merits of the award, but that the challenge throughout has been to the statute under which the award was made. The law under which the award was made does not expire. It continues as a constant threat in future negotiations, and remains an obstacle to the process of good faith collective bargaining envisioned by the National Labor Relations Act.

Finally, the instant petitions present questions of great public interest. They involve not only the principle of the Wisconsin law as applied in a concrete situation, but also the principle of the laws of some eleven other states. The case deals not only with important constitutional questions, but with matters which are currently of great significance to municipalities, states and the federal Government. Likewise, determination by this court at the present time of the difficult constitutional questions involved is of critical importance to large bodies of wage earners who are employed in the field of transportation and by public utilities generally. In the cases above cited this court has held that where such question of public policy was involved it would accept jurisdiction and adjudicate the case.

**Conclusion.**

It is respectfully submitted that the issues involved have not become moot; that they are ripe for determination at the present time; that they could never be determined finally by this court except under the procedure adopted herein; and that the cause involves a question of publici juris which, in the interest of all the citizens of this country, should be finally determined.

Respectfully submitted,

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SAUL COOPER.**

Of Counsel.

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES.**

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**OCTOBER TERM, 1950.**

**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
DIVISION 998, GEORGE KOECHER and CHARLES BREHM,  
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TRANSPORT COMPANY, a Wisconsin Corporation,  
Respondents.**

**On Writ of Certiorari to the Supreme Court  
of the State of Wisconsin.**

**BRIEF FOR THE PETITIONERS.**

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No. 330.

1  
IN THE

# **SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1950.

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA,  
DIVISION 998, GEORGE KOECHER and CHARLES BREHM,  
Individually and in Their Representative Capacity,  
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.  
GOODING, HENRY RULE and J. E. FITZGIBBON, Individu-  
ally and as Members of the Wisconsin Employment Relations  
Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN  
KLOTSCHKE, Individually and as Members of a Board of  
Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY &  
TRANSPORT COMPANY, a Wisconsin Corporation,  
Respondents.

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On Writ of Certiorari to the Supreme Court  
of the State of Wisconsin.

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## **BRIEF FOR THE PETITIONERS.**

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This action was commenced by the filing of a Petition  
for Appointment of Conciliator by the respondent, Mil-  
waukee Electric Railway & Transport Company, under the



provisions of the Wisconsin Statute relating to compulsory arbitration (R. 119). Thereafter, over the continuing objections and reservations of rights of the petitioners, the respondent Board of Arbitration was convened (R. 143-144, 159-160), testimony taken, and a decision and order entered (R. 162-222). Petitioners appealed such order to the Circuit Court for Milwaukee County (R. 106-115), and, from an adverse judgment of the Circuit Court (R. 225-226), to the State Supreme Court. The State Supreme Court affirmed (R. 234). Motion for Rehearing was denied (R. 239).

### **OPINIONS BELOW**

The opinion of the Circuit Court of Milwaukee County (R. 101-106) is unreported. The opinion of the Wisconsin Supreme Court (R. 235-237) is reported in 257 Wis. 53, 42 N. W. (2d) 477.

### **JURISDICTION**

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

In this case the validity of certain statutes of the State of Wisconsin, to-wit: Sections 111.50-111.65, particularly Sections 111.50-111.61 thereof, and a judgment based on such statutes, are drawn in question upon the ground that such statutes and judgment, on their face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to:

(a) Article I, Section 8, and Article VI of the United States Constitution, in that they are contrary to and in violation of rights conferred and duties imposed by superior federal legislation, to-wit: the Labor Management Relations Act, 61 Stat. 136, 29 U. S. C. Supp., Sections 141-197; and

(b) Section 1 of the Fourteenth Amendment to the United States Constitution, in that they deprive petitioners of liberty and property without due process of law and deprive petitioners of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all causes in the State of Wisconsin, was in favor of the validity of the statutes and judgment.

Petitioners argued before the Wisconsin Employment Relations Board (R. 124-125, 129-130, 145-146, 157), before the Board of Arbitration (R. 161), before the Circuit Court for Milwaukee County (R. 102-103, 113-114) and before the Supreme Court of the State of Wisconsin (see decision, R. 235-236) that Sections 111.50-111.65 of the Wisconsin Statutes and more particularly Sections 111.50-111.61, as construed, were unconstitutional and void and of no effect whatsoever because they were repugnant to the provisions of the United States Constitution referred to immediately above.

The federal question of whether the Wisconsin Statutes in question, and the judgment purportedly based on such statutes, violated the Constitution of the United States was raised, therefore, before every tribunal before which argument was heard.

The Supreme Court of the State of Wisconsin held that neither the statutes nor the judgment based on such statutes, as construed, deprive the petitioners of any rights guaranteed under the Constitution of the United States. No specific treatment of the constitutional questions appears in the opinion since this case had been argued with the companion case now before this Court (Case No. 329, October Term, 1950). In its decision in that companion case the Court passed specifically upon the federal constitutional questions raised. In the instant case the Court referred to its opinion in the companion case and stated:

"With one exception the contentions of the appellants in this case were raised in the companion case and were determined therein" (R. 236).

In affirming the judgment of the Circuit Court, it necessarily affirmed that court's ruling (R. 102-103) that the statute was not in violation of the federal Constitution.

Thus, the Wisconsin Supreme Court has held that the State of Wisconsin can, over the objections of employees of a public utility, compel such employees to submit a dispute over wages, hours and working conditions to an ad hoc arbitration tribunal appointed by the State, and to be bound by such tribunal's determination for a period of one year; and that such procedure is not in violation of any provision of the Constitution of the United States.

### **QUESTION PRESENTED**

Whether a State may by statute require employees of a "public utility" employer to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employees to strike.

## **STATE AND FEDERAL STATUTES INVOLVED**

The pertinent state statutory provisions are printed in Appendix A to this brief. They may be summarized as follows:

When a dispute arises between a "public utility employer," as defined in Section 111.51 (1), and its employees, which dispute may result in the interruption of an "essential service," as defined in Section 111.52 (2), and if the collective bargaining process has reached an impasse and stalemate, which in the opinion of the Wisconsin Employment Relations Board has occurred notwithstanding good faith efforts on the part of both sides, either party to such dispute may petition the State Board to appoint a conciliator from a panel previously created by it (Section 111.54).

If the conciliator is unable to effect a settlement of the dispute, a board of arbitration is convened, which has the duty to hear and determine the dispute (Section 111.55).

Certain standards are established with which the arbitrator's decision must comply (Secs. 111.57 and 111.58).

The award of the arbitrators is filed with the Circuit Court of the County in which the dispute arose and, unless reversed upon appeal, is binding on the parties for a period of one year (Sec. 111.59). During the pendency of the arbitration process no change may be made in existing wages, hours and conditions of employment by either party without the consent of the other (Sec. 111.56).

Strikes are absolutely prohibited (Sec. 111.62).

Section 7 of the National Labor Relations Act (29 U. S. C., Section 157) reads as follows: (

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)."

### **STATEMENT**

The petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as the "union" or "Division 998," is an unincorporated, voluntary labor organization. It is the collective bargaining representative of all of the employees of The Milwaukee Electric Railway and Transport Company, hereinafter referred to as the employer, in its operating and maintenance departments. These departments employ approximately 2700 employees, who are engaged in supplying the employer's public passenger transportation service (R. 108-110, 130-131).

The individual petitioners are officers of the union who are acting as individual employees and as representatives of all other employees, as well as in their official capacity (R. 109).

The respondents Wisconsin Employment Relations Board and its members (hereinafter referred to as the State Board) comprise an administrative agency created by Sec. 111.03, Wisconsin Statutes.



The respondent members of a Board of Arbitration were appointed pursuant to Sec. 111.55 of the Wisconsin Statutes (R. 143, 159).

The respondent, Milwaukee Electric Railway & Transport Co., is engaged in the business of furnishing public passenger transportation service by streetcar and motor bus in the City of Milwaukee and its contiguous area, including service to thousands of employees of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce or in interstate commerce. The rolling stock, equipment and material used by the employer is procured in great measure from points outside the State of Wisconsin, the total value of the rolling stock recently acquired before these proceedings from such points outside the state being in excess of \$2,000,000. Its gross operating revenue exceeds \$16,000,000 annually, and it transports in excess of 100,000,000 passengers annually. Any substantial interruption of the business of the employer as a result of a labor dispute would affect interstate commerce (R. 130-132).

The National Labor Relations Board in December, 1947, upon the insistence of the employer that the terms of the National Labor Relations Act be complied with, as amended jurisdiction over the labor relations of the employer, conducted an election among its employees represented by Division 998, and certified that Division 998 was authorized to enter into a "union security" agreement with the employer pursuant to the provisions of Section 8 (a) 3 and Section 9 (e) (R. 132).

A contract between the union and the employer covering wages and working conditions of the employees represented by the union expired December 31, 1948. More than 60 days prior to that date and in accordance with the contract and the law, the union submitted to the employer written proposals for certain specified changes in the old



contract and requested a conference for the purpose of bargaining on such proposals. The employer also sent a written notice to the union, 60 days prior to December 31, 1948, stating that it was therewith terminating and cancelling said contract as of December 31, 1948 (R. 165-166).

The parties negotiated for a new contract during November and December of 1948, but arrived at no agreement (R. 134, 166). The union offered to settle the controversy by submission to a voluntary arbitration tribunal, but the employer refused such offer (R. 134).

Representatives of the Federal Conciliation and Mediation Service attempted to settle the dispute and were still attempting to do so when the jurisdiction of the State Board was invoked (R. 135).

On December 31, 1948, the company petitioned the Wisconsin Employment Relations Board, under the terms of Sections 111.54 and 111.55 of the Wisconsin Statutes, to appoint a conciliator (R. 119).

The union protested the appointment of a conciliator as well as the jurisdiction of the State Board to do so, alleging, among other things, that the statutes invoked were contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States, in that they were in conflict with the Act of Congress known as the Labor Management Relations Act, 61 Stat. 136, 29 U. S. C. Supp., Sections 141-197, and also contrary to the Fourteenth Amendment to the Constitution of the United States (R. 124-130).

The union's objections were overruled and a conciliator was appointed. The union participated in the conciliation proceedings as a matter of courtesy to the conciliator, reserving, however, all objections to the validity of the statute and of the proceedings (R. 137, 142, 152).

At about this time a threatened strike of the employees was restrained, on application by the Board, in the proceedings which are the subject of Case No. 329, October Term, 1950, now before this court.

On the 31st day of January, 1949, the conciliator reported to the Board that he had been unable to effect a settlement within the time allotted (R. 141-143).

Accordingly, the Board proceeded to the appointment of a three-man board of arbitration, in compliance with the statutes (R. 143-144, 158). The union participated in the proceedings leading to the appointment of the arbitrators and in the proceedings before the arbitration board without waiver of, or prejudice to, its challenges to the validity of the law, taking the position that such participation was under the duress and coercion of the law which, by precluding the union from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection, placed in jeopardy such rights as job-security, pensions, and maintenance and improvement of hours, wages and other working conditions (R. 157-158, 223).

During the proceedings leading to the appointment of the arbitrators the union challenged the good-faith efforts of the employer in attempting to arrive at a settlement of the dispute, alleging that the employer had been using the Wisconsin Statutes as a shield against its duty and obligation under federal statutes to bargain collectively and in good faith, and had been relying upon automatic invocation of the Wisconsin law to relieve it from those duties and obligations (R. 128-134, 145-151, 151-154). It was further alleged that the procedure would impede settlement efforts of the Federal Mediation and Conciliation Service (R. 129). The respondent Board held it to be "wholly immaterial" that representatives of the Federal

Mediation and Conciliation Service have been attempting to conciliate the dispute (R. 137).

Prior to the introduction of evidence before the Board of Arbitration the union filed a charge against the employer with the National Labor Relations Board, alleging violation of the National Labor Relations Act by the employer, in that it had failed to bargain collectively and in good faith (R. 224-225). That matter is still pending before the National Board.

After taking evidence from the parties, the Board of Arbitration issued its decision and order which was filed, as required by statute, with the Clerk of the Circuit Court, Milwaukee County (R. 162-222).

The union duly filed a petition for review with the Circuit Court for Milwaukee County, in which it attacked the entire proceedings before the Wisconsin Employment Relations Board and the Board of Arbitration on the principal ground that the statutes under which the proceedings were conducted were null and void because in violation of the Constitution of the United States and the State of Wisconsin (R. 106-115).

On February 17, 1950, the Circuit Court issued its memorandum opinion sustaining the validity of the statutes (R. 101-106). Judgment was accordingly entered on February 23rd, 1950 (R. 225-226).

On appeal to the Wisconsin Supreme Court, judgment was affirmed (R. 234); rehearing was denied (R. 239).

## **SPECIFICATION OF ERRORS**

The Supreme Court of the State of Wisconsin erred:

1. In holding that Sections 111.50-111.65 were not in conflict with the Labor Management Relations Act, 1947, 61 Stat. 136, and, therefore, not in violation of Article I, Section 8, and Article VI of the Constitution of the United States.

2. In holding that Sections 111.50-111.65 were not in violation of the Fourteenth Amendment to the Constitution of the United States.

3. In affirming the judgment of the Circuit Court of Milwaukee County, dismissing petitioners' action to set aside all orders, decisions and awards of the Wisconsin Employment Relations Board and the Board of Arbitration.

## SUMMARY OF ARGUMENT

### I

Since the labor-management relations involved in the instant case are clearly within the scope of the Labor Management Relations Act, 1947, and since the state law provides for compulsory settlement of labor disputes affecting interstate commerce, and thus intrudes upon a field occupied by Congress, the state law must yield if such intrusion results either in conflict with the federal law or if the federal Congress has completely occupied the field. **Hill v. Florida**, 325 U. S. 538; **International Union of United Automobile, Aircraft and Agricultural Workers, etc., v. O'Brien**, 339 U. S. 454.

### A

The same reasoning and authorities which impelled the conclusion of this court in the **O'Brien** case that Congress had completely occupied the field with respect to peaceful strikes for higher wages are determinative here, since the anti-strike and compulsory arbitration provisions of the law cannot realistically be viewed as separate and distinct enactments. However, even if they are separately considered, the compulsory arbitration provisions of the law stand on no better footing than the anti-strike provisions.

1. The heart of the National Labor Relations Act of 1935 was in its purpose to eliminate industrial strife burdening interstate commerce by encouraging the policy of free collective bargaining and by protecting concerted activities in support of such right. **National Labor Relations Board v. Jones & Laughlin Steel Corp.**, 301 U. S. 1, 34, 42-44. Even in its limited occupation of the field, the Act was held to prevent state legislation, which was in conflict with it.

**LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board**, 336 U. S. 18; **Hill v. Florida**, 325 U. S. 538.

The more detailed regulation of the labor-management relationship which was undertaken by Congress in the Labor Management Relations Act, 1947, manifests a clear and unequivocal intent on its part to completely occupy the field to the exclusion of the states. This detailed regulation is found in the provisions of the Act regulating concerted activities of employees, the processes and subject matter of collective bargaining, and the method of settlement of disputes which burden interstate commerce. Considered with provisions recognizing state functions in a limited field, it is apparent that Congress left no room for state regulation in the broad field it occupied.

2. The legislative history and congressional debates show that compulsory arbitration was considered, but rejected as a basis for the settlement of labor disputes in public utilities. Such rejection is persuasive evidence of the congressional intent to occupy the field. **O'Brien case**, *supra*.

## B

Even if state action is not excluded, the state statutory scheme must fall because of irreconcilable conflict with the federal scheme.

1. In the enactment of the Labor Management Relations Act, 1947, Congress declared its policy to eliminate obstructions to the flow of commerce by encouraging the practice and procedure of collective bargaining. While some limitations were placed on concerted activities and on the processes, details and subject matter of collective bargaining, Section 8 (d) and Title II of the Act nevertheless emphasized that the basic principles of collective bargaining were not modified but were to be supplemented by



greater use of mediation and conciliation procedures. By contrast, the state statutory scheme compels the parties to submit their unsettled disputes, whether over a new contract or interpretation of an existing contract, to a tribunal created by the state. This is directly inconsistent with the practice of collective bargaining protected by the federal Act, since with the state ready to step in and make a contract for the parties, the parties are encouraged to permit the state to release them from the responsibilities and stresses of good-faith collective bargaining.

2. Specific conflicts between the two laws occurred in the instant case. The state board found that there had been an impasse in spite of good-faith collective bargaining, contrary to the challenge made by the petitioners, and in spite of the filing of charges by the petitioners with the National Labor Relations Board that the employer had violated his obligations under Section 8 (a) (5) of the National Act.

Further conflict arose when the Board of Arbitration refused petitioners' request that certain types of employees be maintained on certain shifts because the Board felt that the provisions of the Wisconsin statute prohibited it from granting the request. Conflict also arose when the state board denied petitioners' motion to dismiss the state proceedings because of the intercession of representatives of the Federal Mediation and Conciliation Service, the state board holding that such fact was wholly immaterial to the operation of the state law.

## II

The statute is in violation of the Fourteenth Amendment. (This proposition has been argued at length in companion Case No. 329, October Term, 1950, and in the interests of brevity is incorporated herein by reference.)

## ARGUMENT

### I

THE LAW IS CONTRARY TO THE PROVISIONS OF ARTICLE I, SECTION 8, AND ARTICLE VI OF THE CONSTITUTION OF THE UNITED STATES BECAUSE REPUGNANT TO AND IN CONFLICT WITH THE PROVISIONS OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 61 STAT. 136

That the labor-management relations involved in the instant case are clearly within the scope of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Supp. II, ¶ 141-197, and subject to the jurisdiction of the National Labor Relations Board appears from the record herein (R. 120-132) and the decided cases. **National Labor Relations Board v. Baltimore Transit Company**, 140 F. 2d 51 (C. A. 4, 1944), cert. den., 321 U. S. 796; **W. C. King, d/b/a Local Transit Lines**, 91 N. L. R. B. No. 96 (October 6, 1950).

Since the business of the employer is such that its labor relations are covered by the national Act, thus imposing on both the employer and its employees reciprocal rights and duties, the principle that the state law must yield where there is conflict or where the federal Congress has pre-empted the field becomes directly applicable. **Allen-Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board**, 315 U. S. 740; **Hill v. Florida**, 325 U. S. 538; **Bethlehem Steel Company v. New York State Labor Relations Board**, 330 U. S. 767; **LaCrosse Telephone Corporation v. Wisconsin Employment Relations Board**, 336 U. S. 18; **Plankinton Packing Company v. Wisconsin Employment Relations Board**, 338 U. S. 953; **International Union of United Automobile, Aircraft and Agricultural**

**Workers of America, C. I. O., etc., et al. v. O'Brien, 339 U. S. 454.**

The leading features of the state law which petitioners claim must yield to national policy and law are: (a) compulsory arbitration, as provided in Sections 111.54-111.60, Wisconsin Statutes, and (b) prohibition, under penalty and by injunctive process, of concerted quitting of work by employees in furtherance of their wage and working condition demands (Sections 111.62-111.63).

This brief will be confined to the compulsory arbitration features, separately from the prohibition on strikes, although it is obvious that the two features are inherently interrelated and intended to be mutually compensatory.

### A

#### **Congress Completely Occupied the Field in Which the State Law Attempts to Operate**

Petitioners submit that the holding of this court in **International Union of United Automobile, Aircraft and Agricultural Workers of America, C. I. O., etc., et al., v. O'Brien, 339 U. S. 454**, is conclusive on the point that a state statute which absolutely prohibits strikes and requires compulsory arbitration in labor disputes involving public utilities, whose operations affect interstate commerce, intrudes upon a field which has been completely occupied by the federal Congress. The same reasoning and authorities which impelled the conclusion of the court in that case are determinative here, since the state regulation prohibiting strikes and providing for compulsory arbitration cannot, realistically, be viewed as separate and distinct enactments. The anti-strike and compulsory arbitration provisions of the state statute come to this court on separate writs only because in the lower courts they

arose in different proceedings under separate, but, it is submitted, non-severable provisions of the state law.

Even if separately considered, the compulsory arbitration provisions of the law stand on no better footing than the anti-strike provisions. Therefore, the arguments advanced in the companion case, No. 329, October Term, 1950, for application of the **O'Brien** case, *supra*, to the anti-strike provisions of the state law are also applicable to the compulsory arbitration provisions, and are incorporated herein by reference.

However, in the event it is held that the validity of the compulsory arbitration processes of the law must be treated separately, or raise questions distinct from those raised in connection with prohibitions or regulations of the right to strike, this brief will be limited to considerations which, though in a measure duplicate, and are supplemented by, the arguments advanced in the case dealing with the strike prohibitions of the state law, have special pertinence to its compulsory arbitration provisions.

**1. The detailed regulation of the field of labor-management relations by Congress shows its intent to completely occupy that field.**

With the adoption of the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C., §151, and particularly by the inclusion of Sections 7 and 13 in that legislation, Congress reaffirmed and implemented the already recognized right of collective action by employees to safeguard their proper interests; it recognized that one of the most prolific causes of industrial strife was the refusal to confer and negotiate; and that collective bargaining is "likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not compel." **National Labor Relations Board v. Jones & Laughlin Steel Corp.**, 301 U. S. 1, 34, 42-44 (1937).

These observations of the court when the Act was first challenged were based upon matters of which it took judicial notice; previous decisions of the court in the case of **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 209, and **Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks**, 281 U. S. 548; and upon the declarations of policy set forth in the Act.

Subsequently, the court reaffirmed the absence of compulsion in the Act and Congressional recognition of the right of employees to strike "because of the failure of the employer to meet their demands." **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240, 256.

The heart of the National Labor Relations Act, 1935, thus was in its purpose to eliminate industrial strife burdening interstate commerce by encouraging the policy of free collective bargaining, and in protecting concerted activities in support of such right and for other mutual aid or protection.

That in many important aspects the original Act had completely occupied the field, although not as comprehensively as it might have, is demonstrated by the cases holding that the states were precluded from legislating with respect to methods of determining collective bargaining representatives (**Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767; **LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board**, 336 U. S. 18) from imposing restrictions on the eligibility of bargaining representatives to act (**Hill v. Florida**, 325 U. S. 538), and from restraining employers from engaging in practices which were also declared unfair labor practices by the federal Act (**Plankinton Packing Co. v. Wisconsin Employment Relations Board**, 338 U. S. 953). On the other hand, only because of the absence of any parallel federal legis-



lation dealing with employee conduct, and in the absence of any showing that state action impaired federally-guaranteed rights, was it held within the state's power to enforce its law relating to disorderly conduct in connection with labor disputes. **Allen-Bradley Local 1111, etc., v. Wisconsin Employment Relations Board**, 315 U. S. 740.

With the passage of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. ¶ 141), more detailed regulation of the labor-management relationship took place—so detailed, it is submitted, so as to manifest a clear and unequivocal intent on the part of the federal Congress to completely occupy the field to the exclusion of the states, particularly with respect to the process and subject matter of collective bargaining, and the method of settlement of disputes which burden commerce.

This intent was made clear by the sweeping declaration in Section 1 (b) of the Act that:

“It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.”

To accomplish this purpose many limitations not found in the original Act were placed upon union activities. The subjects dealt with were coercion of employees in violation of their rights under Section 7 or of employers in their selection of a bargaining representative [Section 8 (b) (1)];



strikes for certain prohibited purposes [Section 8 (b) (4)]; imposition of excessive or discriminatory fees on employees required to become members of a union under a union-shop contract [Section 8 (b) (5)]; exactions for services not performed or not to be performed [Section 8 (b) (6)]; strikes in the absence of required notice where a contract is in effect [Section 8 (d)]; restricting the eligibility of economic strikers to vote in Board-conducted elections [Section 9 (c) (3)]; use of National Board facilities without compliance with registration and financial-report requirements [Section 9 (f), (g) and (h)]; representing supervisors for the purpose of collective bargaining [Section 14 (a)]; temporary delay of strikes which might imperil the national health or safety (Sections 206-210); unlawful boycotts [Section 303 (a), (b)], and political contributions (Section 304).

To further achieve its policy Congress regulated the processes of collective bargaining by requiring unions to bargain in good faith with employers [Section 8 (b) (3)]; by setting forth the steps that must be followed for good-faith collective bargaining, and before termination or modification of an existing collective bargaining agreement [Section 8 (d)]; by assigning a definite role to the Federal Mediation and Conciliation Service in the settlement of disputes [Section 8 (d) and Title II], and by enlisting the aid of Boards of Inquiry in national emergency disputes and requiring secret-ballot votes in such disputes [Section 206, 209 (b)].

Congress also controlled and regulated the subject matter of collective bargaining by imposing greater limitations on agreements which require union membership as a condition of employment [Section 8 (a) (3)]; permitting states to impose greater restrictions on such type of agreements [Section 14 (b)]; prohibiting the assignment, from wages, of union dues or fees, except under certain circumstances [Section 302 (e) (4)]; and limiting the manner of

operation and extent of coverage of trust funds for the benefit of employees [Section 302 (c) (5)].

In addition to its own detailed regulation of the labor-management relationship, illustrated only in part by the above brief summary, in those instances where Congress thought the state could or should perform some function within the field, specific provision was made to permit its doing so. This is shown by the provisions permitting the National Board to cede jurisdiction to states having consistent legislation [Section 10 (a)]; permitting the states to enact more restrictive regulation of union-security clauses [Section 14 (b)]; and permitting state participation in the mediation and conciliation process [Sections 8 (d) (3), 202 (c), 203 (b)].

Subject only to these exceptions in favor of the state, the field that Congress covered was the entire area of labor-management disputes which would affect the free flow of commerce or cause obstructions to it. This field includes the methods for settlement of disputes, the processes and subject matter of collective bargaining, and approved and disapproved objectives to which concerted activities may be directed.

Wisconsin's plan for compulsory arbitration lies directly in that field. It represents Wisconsin's own idea of how certain labor disputes shall be settled. Its compulsory arbitration process deals with the interpretation of collective bargaining agreements [Section 111.57 (2)] and the establishment of wages, hours and working conditions [Section 111.57 (3)] which shall prevail for a period of one year (Section 111.59).

Thus, "both governments have laid hold of the same relationship for regulation \* \* \*," and the state legislation must yield. **Bethlehem Steel Co. v. New York Labor Relations Board**, 330 U. S. 767, 775.

2. Congress expressly rejected compulsory arbitration as a method of dispute settlement within the field it occupied.

In establishing federal policy within the broad area of labor-management relationships with which it dealt, Congress had many alternatives. Among these alternatives were a number of proposals to have compulsory arbitration as the terminal point of collective bargaining, so as to prevent the disturbances of interstate commerce with which Congress was dealing. Some of these proposals specifically gave states the right to act in public utility disputes. See, Extension of Remarks of Rep. Case, Cong. Rec. A-1007. Such method of final settlement was expressly rejected both in the original and in the amended Act.

During the debates on the original National Labor Relations Act, Senator Wagner, who sponsored that Act, stated (79 Cong. Rec. 7573):

“One method of approach to the problem of industrial peace would be for the government to invoke compulsory arbitration, or to dictate the terms of settlement whenever a controversy arises. Where this procedure has been tried in European nations it has met with only questionable success. In any event, it is so alien to our American traditions of individual enterprise that it would provoke extreme resentment and constant discord.”

Senator Taft, co-author of the Labor Management Relations Act, 1947, and its manager on the floor of the Senate, reaffirmed this congressional purpose to avoid compulsory arbitration as a terminal point in the collective bargaining process. He said (93 Cong. Rec. 5116):

“The Bill does not provide for compulsory arbitration. The cases in Australia cited by the Senator

from Kentucky occurred because labor there secured such a stranglehold, if you please, through statutes and otherwise on the economy of Australia, that finally the country was driven to compulsory arbitration, and, of course, it failed. Our Bill does not provide for compulsory arbitration. It seeks to reduce the power of certain unions so that when the parties come to the collective bargaining table there will be free collective bargaining in which each side will have the right to present its demands, but neither side will present any unreasonable demands, on the theory that they have such unreasonable power that they can enforce unreasonable demands.

**"So, Mr. President, the Bill reaffirms the principle of the Wagner Act. It restores in this country the free collective bargaining today which both management and labor groups recognize must be the basis for satisfactory labor relations between employer and employee."** (Emphasis ours.)

Similarly, the Senate Committee on Labor and Public Welfare, in its report accompanying Bill S. 1126, stated that it had considered, but rejected, proposals for compulsory arbitration for the settlement of labor disputes because experience with what amounted to compulsory arbitration during the exigencies of war showed that "employers and labor organizations tended to avoid settling their difficulties by free collective bargaining," S. Rep. No. 103, 80th Cong., 1st Sess., pp. 13, 28.

It is submitted that this congressional rejection of compulsory arbitration as a panacea for the elimination of the burdens and obstructions placed upon interstate commerce by industrial strife is just as persuasive as was the rejection of the strike-vote legislation considered in the **O'Brien** case in determining the congressional purpose to exclude state action. For, if it is not so considered, then the federal scheme for eliminating such obstructions and

burdens, relying as it does upon collective bargaining, mediation and conciliation, would become no more than a declaration of principles, to be followed or not, as the states within their discretion, deem best. Nothing would remain but a "patchwork plan for securing freedom of employees' organization and collective bargaining." **National Labor Relations Board v. Hearst Publications, Inc.**, 322 U. S. 111, 123.

It is submitted that the Act's broad declaration of purpose and policy, its specific and detailed treatment of the method and substance of collective bargaining, its special reference to state functions in particular matters, the complete absence of compulsory processes for the purpose of settling disputes or as a terminal point for collective bargaining, and the congressional refusal to adopt such compulsory processes clearly show the intent of Congress to completely occupy the field of regulation of labor disputes which interfere with or impede or obstruct the flow of commerce between the states, and that it intended no other regulation than its own. See <sup>Reese v.</sup> **Santa Fe Elevator Corp.**, 331 U. S. 218, 236. It is further submitted that the Wisconsin scheme of compulsory arbitration as a terminal point in collective bargaining, and as Wisconsin's own answer to the problem of minimizing or avoiding industrial strife, represents an intrusion by the state in such field and must therefore fall.<sup>1</sup> **International Union etc. v. O'Brien**, supra.

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<sup>1</sup> Petitioners have not discussed herein the question of whether Congress intended any different treatment of privately-owned public utilities. That it has not, is argued in Petitioners' Brief in Case No. 329, October Term, 1950, which argument is incorporated herein by reference to avoid repetition.



B

**The State Legislation Is in Direct Conflict With  
the Federal Legislation**

Even if it should be held that there was not complete occupation of the field of labor-management relations, and more particularly, the field of free collective bargaining as contrasted with compulsory arbitration, by the Labor Management Relations Act, 1947, then, nevertheless, it is submitted that the state statutory scheme must fall because of irreconcilable conflict with the federal scheme.

1. **Congressional reliance on the process of collective bargaining as the most desirable policy for the settlement of labor disputes, and to accomplish the other purposes of the federal law, is frustrated by the state policy of compulsory arbitration.**

Among the findings set forth by Congress in Section 1 of the Labor Management Relations Act of 1947 is included the finding that the inequality of bargaining power of employees who do not possess full freedom of association, or actual liberty of contract, burdens and affects the flow of commerce and tends to aggravate a recurrent business depression by depressing wage rates and purchasing power of wage earners in the industry. The public policy of the United States is declared to be, in Section 1, to eliminate these and other stated obstructions to commerce,

“ \* \* \* by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

In furtherance of this policy, Section 7 of the original Act was left substantially unchanged, but certain limita-



tions were imposed upon the exercise of concerted activities, and on the processes and subject matter of collective bargaining, as we have already shown.

Of particular significance in ascertaining how far Congress intended that such limitations extend with respect to the settlement of disputes relating to contract negotiations, are the provisions of Section 8 (d) and Title II.

Section 8 (d) reaffirms the essentials of voluntarism and collective bargaining by requiring the parties to meet and confer in good faith with respect to wages, hours and other terms of employment, or with respect to negotiation of an agreement, or questions arising under an agreement. These obligations, however, do not "compel either party to agree to a proposal or require the making of a concession." Where a contract is in existence, sixty days' notice of intention to terminate or modify such contract at a time permissible to do so under the contract must be given [Section 8 (d) (1)], and the parties must meet and confer for the purpose of negotiating a new contract [Section 8 (d) (2)]. Notice of the existence of a dispute must be served within thirty days on the Federal Mediation Service and state mediation agencies [Section 8 (d) (3)], and terms of the contract must be continued for the sixty-day notice period [Section 8 (d) (4)]. If a strike takes place before full compliance with the section, the striking employees are deprived of their status as employees under the Act.

Thus, Section 8 (d), consistent with congressional policy and purposes, places its reliance on the process of collective bargaining and mediation by the state and federal government, permitting a strike to occur after its requirements are met.

Title II of the Act similarly and consistently sets forth this congressional reliance on collective bargaining and

the principles of voluntarism as the most effective and only desirable means of minimizing industrial disputes affecting commerce. Its provisions have already been examined in detail in Petitioners' Brief in Case No. 329, October Term, 1950. Those pertinent here may be briefly summarized as follows:

Re-emphasis is placed on the federal findings that industrial peace can most satisfactorily be secured by the processes of conference and collective bargaining [Section 201 (a)], that settlement of disputes may be advanced by making available full and adequate governmental facilities for conciliation, mediation and **voluntary** arbitration [Section 201 (b)]; and that controversies which arise under collective bargaining agreements can be minimized by governmental assistance in formulating procedures for final adjustment of grievances, which procedures are to be included in the agreement of the parties [Section 201 (c)].

The Director of the Federal Mediation and Conciliation Service is authorized to arrange for cooperation with state and local mediation services [Section 202 (c)]; a duty is placed upon the Service to assist the parties to settle their disputes through conciliation and mediation [Section 203 (a)], but if such dispute will have only a minor effect on interstate commerce, the Service is not to intercede if state or other conciliation services are available to the parties [Section 203 (b)]; the Director of the Service is to induce the parties to voluntarily seek other means of settlement if conciliation and mediation fails, including secret-ballot vote on the employer's last offer, but failure to accept any procedure suggested by the Director is not a violation of any duty under the Act [Section 203 (c)]; disputes arising under contracts are to be settled expeditiously and, if not, the parties must participate promptly in meetings called by the Service for that purpose of aiding in settlement (Section 204).

Sections 206 through 210 of Title II set forth a special method of handling disputes which imperil the national health or safety and provide for temporary restraint of strikes or threatened strikes in connection with such dispute, pending fact-finding procedures and secret-ballot elections of the employees. After the expiration of the "cooling off" period, the strike is permitted to run its course. Even in these cases of acute emergency, Section 209 (a) provides that "neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service."

Contrasted with the federal policy of voluntarism and aids to collective bargaining, the state statutory scheme compels the parties to submit their disputes, whether over a new contract or interpretation of an existing contract, to a tribunal created by the state; and requires the parties to abide the directions of such tribunal with respect to the wages, hours and conditions of work which shall prevail among the employees of the particular employer for a period of one year (Sections 111.57-111.60). The jurisdiction of the state Board of Arbitration to interpret contracts [Section 111.57 (2)] is not only directly contrary to the federal policy, expressed in Sections 201 (c) and 204 of the federal Act, that such matters should be handled by voluntary agreement,<sup>2</sup> but is also in violation of the principle that contract interpretation is a proper subject of negotiation. **National Labor Relations Board v. Sands Manufacturing Co.**, 306 U. S. 332, 342. Additionally, this function of the State Arbitration Board impinges on the duties of the National Board which is required to interpret contracts to ascertain if there is violation of the federal Act. **National Licorice Co. v. National Labor Relations Board**, 309 U. S. 350, 359-360.

<sup>2</sup> Consistent with federal policy, petitioners offered to arbitrate the instant dispute in voluntary proceedings, but such offer was rejected by the employer (R. 128, 134) and considered immaterial by the state board (R. 137).

Clearly the state thus supplies a different diluted and inconsistent substitute for the process of full and free collective bargaining established by Congress under the national Act.

The state apparently believes that its remedy is just as good for the workers involved, and better for the rest of the population, than the one prescribed by Congress. Concededly, the remedy prescribed by Congress in Section 7 includes as a necessary, although sometimes bitter ingredient, the ultimate right to strike. But the congressional prescription is based upon its belief that without such right to strike there cannot be genuine collective bargaining.

The practice of collective bargaining, as it has developed historically, and as it is protected by Section 7 of the federal Labor Act, necessarily excludes the subjecting of the participants to a threat (or promise), even before the parties sit down to negotiate, of a governmental decision concerning wages and working conditions if the parties disagree. For if the alternative to a stalemate in negotiation is the right of the parties to obtain the decision of a tribunal as to the disputed terms, then the process of negotiation is, from its very inception, not a bargaining for services, but a compromise of the hazards of the tribunal's decision. In such a situation the resulting compromise—if there is a compromise rather than a resort to the tribunal—is not a result of a free bargain for the employee's services, and does not represent the fair value which could be obtained by genuine collective bargaining.

This is one of the many reasons why proposals to establish a national policy of compulsory arbitration in public utility and other important industries were rejected by the 80th Congress, as we have already pointed out. This reason was stated by Senator Taft as follows (93 Cong. Rec. 3835):

"We did not feel that we should put into the law as a part of the collective bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided."

The conclusion of the Congress of the United States that compulsory arbitration would tend to destroy free collective bargaining is an accurate reflection of the experience of many competent observers of, and experts in, the field of industrial relations.

Before the House Committee on Education and Labor, which reported Bill H. R. 3020, the then Secretary of Labor (Lewis B. Schwellenbach) testified, on March 11, 1947, as follows:

"Compulsory arbitration is the antithesis of free collective bargaining. Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminates free collective bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretense of bargaining in anticipation of a more favorable award from an arbitrator than would be realized through their own efforts. The net result would be a weakening of free bargaining and an increasing reliance on the compulsory arbitration pro-



cedures, and it is obvious that with the growth of such an attitude, the use of conciliation and mediation procedures would decline concurrently. Conciliation and mediation are instruments of free collective bargaining, aids to the parties in arriving at voluntary and mutually acceptable settlements. Compulsory arbitration would discourage their use in the same degree that it would lessen the inclination to bargain freely in arriving at settlements in labor disputes" [Legislative History of the Labor Management Relations Act, p. 392 (Government Printing Office, 1948)].

In the Proceedings of the Second Annual Meeting of the Industrial Relations Research Association, at pages 14-27, Thomas Kennedy, Assistant Professor of Industrial Relations, University of Pennsylvania, in a study entitled "The Handling of Emergency Disputes," sets forth the results of research covering some four years of operations of the New Jersey Compulsory Arbitration Statute (N. J. S. A. 34: 13B-1 et seq.). With respect to what constitutes a public emergency, it is pointed out that strikes in telephone service and in local transit services do not actually cause a public emergency, and that strikes in the electric light and power industry, even if they are complete, do not result in any immediate jeopardy of public health and safety, as had been anticipated.

The answer to the question, "What is there in the nature of compulsory arbitration which makes it difficult for free collective bargaining to function effectively when such a law is in effect?" was found in the following:

1. " \* \* \* the fear of each negotiating party to suggest what appears to him to be a reasonable basis for settlement, especially of a wage issue, lest the other side use the offer merely as a springboard for securing for itself a better settlement through compulsory arbitration. \* \* \* Negotiations are thus



stymied and compulsory arbitration is both the cause and the result of the failure of free collective bargaining."

2. " \* \* \* the fear of negotiators to assume responsibility for a settlement when better terms might possibly be secured through compulsory arbitration."

3. " \* \* \* the difficulty of 'washing out' the unessential demands of the parties."<sup>3</sup>

4. " \* \* \* a tendency now to prepare for annual arbitration rather than for annual negotiations."

5. " \* \* \* a company may prefer to use compulsory arbitration when it is available if it is of the opinion that the granting of what it considers a reasonable and necessary wage raise will necessitate an increase in the rates to be paid by the public for its service."

After pointing out that these factors vary from industry to industry and from company to company, it is reported that:

"Labor, management, and representatives of the public, however, generally agree, and the record supports their belief, that compulsory arbitration has had a very damaging effect on free collective bargaining in New Jersey public utilities."<sup>4</sup>

Result of the research is summarized as revealing that perhaps the greatest cost of outlawing public utility strikes and substituting seizure and compulsory arbitration is the crippling effect on collective bargaining; that experience proves that strikes in public utilities do not result in immediate jeopardy to public health and safety and, therefore, there is room for permitting threats of

<sup>3</sup> An illustration of this occurs in the instant case (R. 167).

<sup>4</sup> A similar conclusion is reported in MacDonald, Compulsory Arbitration in New Jersey, 625, 701 (New York University Second Annual Conference on Labor, Mathew Bender & Co., 1949).

strikes and strikes to perform their functions which are so essential to free collective bargaining; and that if a real threat to public health and safety should occur, the general emergency powers of the state or federal government are always available.<sup>5</sup>

That the availability of the state process of compulsory arbitration becomes increasingly relied upon by labor and management, to the prejudice of free collective bargaining is also shown by Wisconsin's own experience. During the fifty years preceding passage of the Wisconsin law there had been approximately ten strikes of public utility workers. Polner, *Some Aspects of the Recent State Legislation to Prohibit Strikes in Public Utilities*, p. 45 et seq. (Unpublished study, Department of Economics, University of Wisconsin, 1948). Yet, in one year of operation under the Wisconsin law, fifteen cases had been received by the Wisconsin Board for handling by it. Of these cases, nine had been filed by unions, three by employers, and in three the Board intervened. *Eleventh Annual Report, Wisconsin Employment Relations Board*, p. 28 (1948-1949). Bearing in mind that the provisions of the Wisconsin law become applicable on a showing of impasse or stalemate in collective bargaining which may lead to an interruption of an essential service, and bearing in mind that strikes in public utilities in Wisconsin have been rare occurrences, it is reasonable to assume that impasses have been created, and strikes threatened, so that either party can thrust upon the state the burden of making a contract, rather

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<sup>5</sup> Eminent representatives of the public and industry have similarly expressed the conviction that compulsory arbitration in public utilities is inconsistent with, and destructive of, free collective bargaining. See Frey, *The Logic of Collective Bargaining and Arbitration*, 12 *Law and Contemporary Problems* 264, 271; Fitzpatrick, *The Settlement of Contract Negotiation Disputes: A Business Viewpoint*, 12 *Law and Contemporary Problems* 346, 353; Friedin, *The Public Interest in Labor Dispute Settlements*, 12 *Law and Contemporary Problems* 365, 372; George W. Taylor, *Government Regulation of Industrial Relations* (Prentice-Hall, Inc., 1948); *Labor and National Defense* (Twentieth Century Fund, 1941); the President's National Labor-Management Conference (Bulletin No. 77, United States Department of Labor, Division of Labor Standards, 1946).

than permitting the processes of free collective bargaining to fulfill their functions.

It can thus be seen that there is a basic and irreconcilable conflict between the theories of free collective bargaining and compulsory arbitration. The two systems cannot consistently stand together, even though, as the state argues, its processes do not take place until after collective bargaining has reached an impasse or stalemate. For, as we have shown, there can be no such thing as the good-faith collective bargaining required under the National Act where the state provides for compulsory arbitration as a sort of rear-door through which either party may escape from its obligations and transfer its duty of making a contract to the state.

The availability of the compulsory arbitration procedure provides a release from the unremitting economic stress to stay at the give-and-take process of the bargaining table until a voluntary agreement is reached, because, instead of allowing the force of economic pressures to break a stalemate or impasse, this statute permits either of the parties to escape from the responsibility, often heavy, of making concessions.

**2. There is also specific conflict between the state and federal law as they relate to collective bargaining.**

Not only does the general scheme of compulsory arbitration embodied in the state law conflict with the federal law, but specific provisions of the Wisconsin law also demonstrate the inability of the two laws to consistently operate in the same field.

a. The arbitration process of the Wisconsin law is set into motion upon a state board finding that "in its opinion the collective bargaining process, notwithstanding good-faith efforts on the part of both sides to such dispute, has

reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause an interruption of an essential service" (Section 111.54). Thus "at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 6) the state steps in and deprives the employees of their rights under federal law and relieves the employer of his duties under such law. This point was considered so important in the entire scheme of the federal Act that it was the reason for defining the term "employee" as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute \* \* \* " [Section 2 (3)] and so prevent withdrawal of the government from the field when the critical point was reached (S. Rep. No. 573, supra). Additionally, a determination as to whether or not there has been a refusal of either party to bargain in good faith is made under the Wisconsin law by the state board. However, since the employer here is subject to the federal Act, exclusive jurisdiction to make such finding is vested in the National Labor Relations Board [Sections 8 (a) (5), 8 (b) (3), 10 (a)]; **Plankinton Packing Co. v. Wisconsin Employment Relations Board**, 338 U. S. 953. One of the motions made by petitioners to dismiss the proceedings was based on its allegation that there was no impasse or stalemate in the collective bargaining process, notwithstanding good-faith efforts on the part of both sides to the dispute (R. 128). This motion was denied by the state board (R. 137). Subsequently, petitioners invoked the superior jurisdiction of the National Board to make the determination on that question (R. 144). The state board, nevertheless, continued to exert the jurisdiction which it had assumed.

b. Specific conflict also arises by reason of Section 111.58 of the state act which provides "that the arbitrator shall not make any award which would infringe upon the right

of the employer to manage his business." The state thus removes from the area of relief which can be granted to the employee those matters over which the employer and union must bargain collectively. In the instant case, this section became directly involved in connection with a union request that certain types of employees be maintained on certain shifts. The Board of Arbitration refused to grant such request, solely because of its lack of power to do so under the above quoted provision of the statute (R. 198).

The process of collective bargaining and the entering into of signed agreements incorporating the results of such bargaining must of necessity infringe in some way or other upon the right of the employer to manage his business in the absolute and unrestricted sense. Any concession made by an employer during the process of collective bargaining results in such infringement.

Under federal law, any matter dealing with wages, hours or conditions of employment is a proper subject for collective bargaining, subject only to compliance with legislative regulation of the same subject. **Matter of Consumers' Research, Inc.**, 2 N. L. R. B. 57; **Matter of Timken Roller Bearing Co.**, 70 N. L. R. B. 500; **National Labor Relations Board v. Inland Steel Co.**, 170 F. 2d 247 (C. A. 7, 1948), cert. den. 336 U. S. 960. So here the state has not only relieved the employer from its duty to bargain collectively by providing the rear exit of compulsory arbitration, but at the same time has precluded the employees from attaining in the compulsory arbitration process that which they might have otherwise attained in collective bargaining.<sup>6</sup>

<sup>6</sup> A more glaring example of a similar result under state laws is provided by the recent decision of the Supreme Court of New Jersey in the case of **New Jersey Bell Telephone Co. v. Communications Workers of America, etc., et al.**, ... N. J. ... (not yet officially reported), in which an award of a union shop by a statutory arbitration board was reversed, notwithstanding the union's compliance with the requirements of the federal Act, because it did not result from free collective bargaining within the contemplation of the federal Act.



c. We have already pointed out in Petitioners' Brief in Case No. 329, October Term, 1950, the inconsistencies in the mediation procedures of the Wisconsin Act as compared with those procedures of the federal Act, and to the report of the Director of the Federal Mediation and Conciliation Service that such state laws are interfering with the duties imposed on the service by Congress. An actual instance of that type arose in the instant case, during the proceedings preliminary to the appointment of the Board of Arbitration. Among the motions made by petitioners, one was made to dismiss the proceedings because representatives of the Federal Mediation and Conciliation Service of the United States Government had been and still were seeking to settle the controversy, and that the appointment of a conciliator by the Wisconsin Board would result not only in a duplication of effort, confusion, and conflict, but would also result in interfering with the operation of federal laws and agencies contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States (R. 129). The allegation with respect to the intervention of the Federal Mediation and Conciliation Service was supported by a sworn affidavit (R. 134-135). In passing on this motion, the Chairman of the respondent Board stated (R. 137):

“ . . . we think it is wholly immaterial whether the representatives of the Federal Mediation and Conciliation Service had been attempting to conciliate this dispute or whether anybody else has been attempting to conciliate this dispute.”

It is submitted that these three examples of direct conflict and inconsistency served to underline the basic soundness of the decisions which preclude the state from adopting legislation in a field which has been occupied by the Congress, or, if not occupied, which is directly in conflict with the federal Act.



II

THE STATUTE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT

That the Wisconsin statute deprives of rights assured under the Fourteenth Amendment has been already argued in the companion Case No. 329, October Term, 1950. In the interests of brevity, that argument is incorporated herein by reference.

CONCLUSION

It is respectfully submitted that the Wisconsin statute and the judgment based on such statute are in violation of Article I, Section 8, and Article VI of the federal Constitution because they intrude upon or are in conflict with congressional action in the same field; and are in violation of the Fourteenth Amendment to the federal Constitution because they deprive of liberty and property without due process of law. For these reasons the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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Of Counsel.

## APPENDIX A

### Wisconsin Statutes

#### SUBCHAPTER III

##### Public Utilities

**111.50 Declaration of Policy.** It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

**111.51 Definitions.** When used in this subchapter:

- (1) "Public utility employer" means any employer — (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat,

gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employees.

(2) "Essential service" means furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin Employment Relations Board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

**111.52 Settlement of Labor Disputes Through Collective Bargaining and Arbitration.** It shall be the duty of public utility employers and their employees in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

**111.53 Appointment of Conciliators and Arbitrators.** Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal

with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

**111.54 Conciliation.** If in any case of a labor dispute between a public utility employer and its employees, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employees are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

**111.55 Conciliator Unable to Effect Settlement; Appointment of Arbitrators.** If the conciliator so named is unable

to effect a settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

**111.56 Status Quo to Be Maintained.** During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

**111.57 Arbitrator to Hold Hearings.** (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in dispute. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;


(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The over-all compensation presently received by the employes having regard not only to wages for time actually worked, but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employes. The foregoing enumeration of factors shall not be construed as preclud-



ing the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

**111.58 Standards for Arbitration.** The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

**111.59 Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity.** The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit court of the county wherein the dispute arose or where the majority of the employees involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements  the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed be-

tween the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator.

**111.60 Judicial Review of Order of Arbitrator.** Either party to the dispute may, within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review hereinabove set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

**111.61 Board to Establish Rules.** The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

**111.62 Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty.** It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work

stoppage or slowdowns which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63. **Enforcement.** The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 **Construction.** (a) Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent; or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employees, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65. **Separability.** It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereof.

OCT 24 1950

No. 330

**SUPREME COURT OF THE UNITED STATES**

CHARLES ELMORE CROPLEY  
CLERK

October Term, 1950

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,

*Petitioners,*

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCH, Individually and as Members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE  
WISCONSIN SUPREME COURT

BRIEF OF RESPONDENTS' WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*Employment Relations Board.*





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# SUPREME COURT OF THE UNITED STATES

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October Term, 1950

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
WISCONSIN SUPREME COURT

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**BRIEF OF RESPONDENTS' WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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## OPINIONS BELOW

The opinion of the Circuit Court for Milwaukee County (R. 101-106) is unreported. The opinion of the Wisconsin Supreme Court (R. 235-237) is reported in 257 Wis. 53, 42 N. W. (2) 477.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C.

## QUESTION PRESENTED

May a state, in the exercise of its police power, substitute compulsory arbitration for a strike in a labor dispute between a union and a public utility supplying an essential public utility service where

- (1) the utility's operations are local in character and do not involve the "national health or safety" so as to invoke the "emergency" provision of the Taft-Hartley Act (29 U. S. C. Supp. § 180) and where
- (2) pursuant to statute a court of competent jurisdiction has found that a work stoppage by the union in the supply of such essential public utility service will create an emergency resulting in irreparable injury to the citizens of such state.

## STATE AND FEDERAL STATUTES INVOLVED

The pertinent state statutes, sections 111.50 to 111.65, Subchapter III of Chapter 111 of the Wisconsin Statutes for 1949, are printed in the appendix.

The pertinent federal statute is the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. §§ 141 to 197.

## STATEMENT

The arbitrators made and filed their award on April 11, 1949, pursuant to the provisions of Section 111.59 of Wisconsin Statutes of 1949. Under the statute, the award "shall continue effective for one year from that date".

## ARGUMENT

### I.

Petitioner contends that Subchapter III of Chapter 111 of the Employment Peace Act is Repugnant to the National Labor Relations Act as amended in that it is Contrary to Article I, Section 8 and Article VI of the Federal Constitution.

This is unsound for the two following reasons:

- (a) Congress has not protected the union conduct which Wisconsin has forbidden.

That Congress has concurred in the view that neither Section 7 of Taft-Hartley (29 U. S. C. A. § 157), nor Section 13 (29 U. S. C. A. § 163), confer absolute right to strike does not rest on mere inference. The opinion in *International Union, U. A. W., A. F. of L., Local 232 et al., v. Wisconsin Employment Relations Board et al.*, (1949) 336 U. S. 245, 69 S. Ct. 516, reviews the recommendation of the House Committee of Conference (handling the bill which became the Labor Management Relations Act) that the House recede from its position of enumerating exceptions to the protection of Section 7 (29 U. S. C. A. § 157)

because of real concern that the inclusion of such enumerated exceptions would have a limiting effect and draw within the protection of Section 7 a variety of improper conduct not specifically mentioned.

Petitioner's contentions in its brief are couched in the general phrases "the superior jurisdiction" of the Federal Labor Board, at page 18, or "the entire policy" of the federal act, at page 19, or a "national policy in labor management relations", at page 18.

In substance, petitioner's contentions are those set forth in the dissenting opinion of Mr. Justice Douglas, in the *Wisconsin Auto Workers* case, supra. If we understand the dissenting opinion correctly, it contends the decision in *Hill v. Florida*, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782, ought to have been controlling in the *Wisconsin Auto Workers* case. The complete answer to petitioner's contention is found in the dissenting opinion in *Hill v. Florida*, supra, and, of course, in the majority opinion in the *Wisconsin Auto Workers* case.

We do find, however, reliance by petitioner specifically upon several sections of the Federal Act. At pages 13 and 14 of its brief, it contends Wisconsin, in insuring continuity of essential service in local public utilities, is obstructing interstate commerce, contrary to Section 7 of the Federal Act. This contention ignores the thorough examination of Section 7 in the *Wisconsin Auto Workers* case, supra.

Further, at pages 18 to 20, petitioner contends, presumably, that Section 10 (a) grants to the Federal Board, an "exclusive jurisdiction" (p. 18) to determine whether a party is bargaining in good faith under Section 8 (a) (5). This contention ignores the thorough examination of this issue in *Algoma Plywood Co. v. Wis. Board*, (1949) 336 U. S. 301, 69 S. Ct. 584, where this court said:



[336 U. S., 305]

"In seeking to show that the Wisconsin Board had no power to make the contested orders, petitioner points first to § 10 (a) of the National Labor Relations Act, which is set forth in the margin. It argues that the grant to the National Labor Relations Board of 'exclusive' power to prevent 'any unfair labor practice' thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this argument implies two equally untenable assumptions. One requires disregard of the parenthetical phrase '(listed in section 8)'; the other depends upon attaching to the section as it stands, the clause 'and no other agency shall have power to prevent unfair labor practices not listed in section 8.'"

We note the word "exclusive" is used advisedly in the *Algotma* decision, because Congress carefully omitted it from the amended act. The footnote reference to section 10 (a) at page 305, 336 U. S., is to the original act, not to the act as amended by the Labor-Management Relations Act of 1947.

Petitioner contends, at page 19 of its brief, that Wisconsin, in providing at sec. 111.58 of its state statute, Wis. Stats. 1949:

"The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union."

has removed from the area of relief which can be granted an appropriate subject of collective bargaining. This exercise by the arbitrator of its power not to grant relief, if relief sought was proper, is subject to review under the Wisconsin Act at section 111.60 thereof.

No attempt was made by Section 13 (29 U. S. C. A. § 163), of the Federal Act to regulate what other Acts or other State laws might do. Not even if we use such general terms as "policy of the act" or "scope of the act", and ignore its precise terms, can conflict and repugnancy be found. And this is because there is no available regulation by the Federal Board within the rule announced in *Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America, et al., v. Wisconsin Employment Relations Board*, (1942) 315 U. S. 740, 749, 62 S. Ct. 820, 86 L. ed. 1154. In *U. A. A. and A. I. W. of A., C. I. O. v. O'Brien*, (1950) 70 S. Ct. 781, 94 L. ed. 659, it became apparent that Congress had made available to the Federal Labor Board the precise authority to determine the collective bargaining unit, a ministerial function, but, as established, a unit which Michigan found it could not disregard. Section 9 (29 U. S. C. A. § 159). See *UAW-CIO v. O'Brien*, supra.

(b) In crisis labor situations, under Title II of the Federal Law, Congress has not acted.

This has been briefed in the companion case, #329.

## II.

Petitioner contends the Wisconsin Law Violates the Federal Fourteenth Amendment.

This has been briefed in the companion case, # 329.

## III.

The Writ Should be Denied Because the Question is Moot.

The award of the arbitration board was made and filed with the clerk of the Circuit Court for Milwaukee County on April 11, 1949. In view of the statutory provision that the effective period of the award shall be limited to one year, the petitioner really has no unsettled issue pending.

### CONCLUSION

The decision below is correct and there is no conflict of decisions or a material constitutional question. We respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS E. FAIRCHILD  
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*Deputy Attorney General*

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*Attorneys for Wisconsin  
Employment Relations Board.*

## APPENDIX

## Wisconsin Statutes

## SUBCHAPTER III.

## Public Utilities.

111.50 DECLARATION OF POLICY. It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlements of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 DEFINITIONS. When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state; and shall be deemed to include a rural electrification co-operative association engaged in the business of furnishing any one or more of such services or utilities to its members in this state. *Nothing in this subsection shall be interpreted or construed to mean that rural electrification co-operative associations are hereby brought under or made subject to chapter 196 or other laws creating, governing or controlling public utilities, it being the intent of the legislature to specifically exclude rural electrification co-operative associations from the provisions of such laws. This subchapter does not apply to railroads nor railroad employees. (Italicized matter added by Ch. 37, Laws of 1949)*

(2) "Essential service" means furnishing water, light, heat, gas electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin employment relations board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

**111.52 SETTLEMENT OF LABOR DISPUTES THROUGH COLLECTIVE BARGAINING AND ARBITRATION.** It shall be the duty of public utility employers and their employees in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

**111.53 APPOINTMENT OF CONCILIATORS AND ARBITRATORS.** Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the



board by section 20,585 upon such authorizations as the board may prescribe.

**111.54 CONCILIATION.** If in any case of a labor dispute between a public utility employer and its employees, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employees are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

**111.55 CONCILIATOR UNABLE TO EFFECT SETTLEMENT; APPOINTMENT OF ARBITRATORS.** If the conciliator so named is unable to effect settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as

the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 STATUS QUO TO BE MAINTAINED. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action, of either party without the consent of the other.

111.57 ARBITRATOR TO HOLD HEARINGS. (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in disputes. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the

existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The overall compensation presently received by the employees having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employees. The foregoing

enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

**111.58 STANDARDS FOR ARBITRATION.** The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

**111.59 FILING OF ORDER WITH CLERK OF CIRCUIT COURT; PERIOD EFFECTIVE; RETROACTIVITY.** The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit court of the county wherein the dispute arose or where the majority of the employees involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall

continue effective for one year from the date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator. (Italicized matter added by Ch. 634, Sec. 16, Laws 1949)

111.60 JUDICIAL REVIEW OF ORDER OF ARBITRATOR. Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the abitrator as to any issue or issues for such further action as the circumstances require.

111.61 BOARD TO ESTABLISH RULES. The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 STRIKES, WORK STOPPAGES, SLOWDOWNS, LOCK-OUTS, UNLAWFUL; PENALTY. It shall be unlawful for any group of employees of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employees acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 ENFORCEMENT. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 CONSTRUCTION. (a) Nothing in this subchapter shall be construed to require any individual employee to



render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employee to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employees, where such acts would cause an interruption of essential service.

° (b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 SEPARABILITY. It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

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**In the Supreme Court of the United States**

**October Term, 1950 - - - - Number 330**

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**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,**

**Petitioners,**

**vs.**

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCHKE, Individually and as Members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation,**

**Respondents.**

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**On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Wisconsin.**

---

**BRIEF FOR THE RESPONDENT  
IN OPPOSITION.**

---

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL and CHARLES BREHM, Individually and in Their Representative Capacity,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, Individually and as Members of the Wisconsin Employment Relations Board; CARL LUDWIG, H. HERMAN RAUCH and MARTIN KLOTSCHKE, Individually and as Members of a Board of Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation,

Respondents.

---

On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Wisconsin.

---

## **BRIEF FOR THE RESPONDENT IN OPPOSITION.**

---

### *OPINION BELOW.*

The opinion of the Wisconsin Supreme Court (R. 235-237) is reported at 257 Wis. 53. The opinion of the circuit court (R. 101-106) is not reported.

## *JURISDICTION.*

The judgment of the Wisconsin Supreme Court was entered May 2, 1950. (R 234) A motion for rehearing was denied on June 30, 1950. (R. 239) The jurisdiction of this Court is invoked under Section 1257(3) of Title 28, U. S. C.

## *QUESTIONS PRESENTED.*

1. Whether a State may by statute prohibit strikes which threaten to interrupt an essential public utility service.

2. Whether a State, having prohibited strikes in such cases, can require that labor disputes be settled by arbitration when they have reached an impasse.

## *STATE STATUTES INVOLVED.*

The State statutes involved are printed in Appendix A to the petition.

## *STATEMENT.*

In addition to the facts stated in the petition, we would like to add that the respondent Company is a local urban transportation company furnishing transportation only to Milwaukee and its immediately surrounding suburbs. (R. 131)

After the case below was presented by briefs and oral argument to the Wisconsin Supreme Court, the Union and the Company entered into a labor contract on April 7, 1950, effective as of April 1, 1950, said contract not to expire until September 20, 1951. (Appendix A)

## ARGUMENT.

### I.

#### *The Principle Issues Presented by the Petition Are Now Moot.*

In petitioners' brief under the title "*Question Presented*," the principal question set forth is as follows:

"Whether a State may by statute require employees of a 'public utility' employer to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employees to strike."

We submit that this question has become moot, and therefore is no longer open to adjudication. The nature of this suit was an action to review and set aside an order of the arbitration board. Section 111.59 of the Wisconsin Statutes provides that the order of the arbitration board shall "continue effective for one year from that date (the date filed with the Clerk of Circuit Court), but such order may be changed by the mutual consent or agreement of the parties." The order of the arbitration board was issued on April 9, 1949, and was filed with the Clerk of the Circuit Court for Milwaukee County on April 11, 1949. (R. 222) By virtue of Section 111.59 the order became ineffective on April 11, 1950, unless changed by agreement of the parties. The parties entered into a contract on April 7, 1950, to run for 18 months (Appendix A), which by operation of law rendered the arbitration order ineffectual. Thus there is no longer any occasion to challenge the power of the state to require public utility employers and employees to submit to arbitration. No justiciable contro-

versy now exists in which petitioners can challenge the state's power. This Court has no jurisdiction to pass on a federal question that is moot. *Kimball vs. Kimball*, 174 U. S. 158; *Little vs. Bowers*, 134 U. S. 547.

The same is true of the companion case, No. 329, October Term, 1950, in which a Petition for Writ of Certiorari was filed at the same time with the case at bar. Both cases arose out of the same dispute and involve the same statute and the same question of law. In both cases the Union has challenged the validity of Section 111.50-111.65 of the Wisconsin Statutes. Before the Wisconsin Supreme Court, the Union in *each* case urged that the state had no power to prohibit strikes and to require the submission of disputes to arbitration. However, in its two Petitions before this court, the Union for reasons of brevity or otherwise, has sought to separate these issues. In its brief in the instant case, it attacks only the power to require arbitration, and in the companion case it attacks the power to prohibit strikes. These two issues cannot be considered separately. The requirement to submit to arbitration is inherently and necessarily correlated to the prohibition of the right to strike. It is in effect a substitute for the right to strike.

The issue in the companion case is likewise moot. The arbitration order is no longer in effect. The parties voluntarily entered into a contract on April 7, 1950, which will not expire until September 30, 1951. (Appendix A) The parties are no longer proceeding under the Wisconsin law in question. They are now carrying on under a labor contract conclusively presumed to be acceptable to both. Petitioner is no longer in a position to attack the injunction.

## II.

*The Wisconsin Statutes Are Not in Conflict  
With the Taft-Hartley Act.*

As we have concluded that the two principal issues involved in these two cases, viz., the power of the state to prohibit strikes in the public utility industry and the power to require that labor disputes in public utilities be submitted to arbitration, are necessarily interrelated and cannot be considered separately, we shall direct our argument to both issues.

Petitioner has urged that the Wisconsin law is in direct and irreconcilable conflict with the Labor Management Relations Act, 61 Stats. 136, USCA §§141-197, more commonly referred to as the Taft-Hartley Act. Petitioner more particularly asserts that the prohibition of the right to strike by public utility employees and the substitution therefor of the compulsory arbitration procedure is a direct infringement of the employees' right "to engage in other concerted activities for the purpose of collective bargaining," as set forth in Section 7 of the Federal Act.

To answer this contention it should be noted at the outset that the right to strike is not an absolute and unqualified right. *International Union vs. Wisconsin E. R. Board*, 336 U. S. 245; *Allen-Bradley Local vs. Wisconsin E. R. Board*, 315 U. S. 740.

Section 7 of the Taft-Hartley Act recognizes the right of employees to engage in "concerted activities." Did Congress by the use of this general term intend to take away from a state its power to protect its inhabitants in respect to the maintenance of essential public utility services? We contend that Congress had no such intention. This Court has said that "the intention of Congress to exclude the States from exercising their police power must

be clearly manifested," and that the Court "will not lightly infer that Congress by the mere passage of a Federal Act has impaired the traditional sovereignty of the several states in that regard." *Allen-Bradley Local vs. Wisconsin E. R. Board*, supra; *International Union vs. Wisconsin E. R. Board*, supra.

---

A — *The Wisconsin legislature sought to protect the public from the dire consequences that result from the interruption of an essential public utility service.*

In the enactment of the Wisconsin act, it is apparent that the legislature took into consideration the dire consequences that may result from the interruption of essential public utility services. Consider, for example, the electric utility industry. It does not require a high degree of imagination to realize the consequences that may be incident to the interruption of electric service. Many thousands of homes would be unheated; it would be impossible to properly cook and prepare foods for human consumption; there would be no adequate water supply for human consumption or for purposes of sanitation; practically all of the large industrial factories would be required to close their doors because of lack of power to operate the same and as a result many of thousands of employees would be thrown out of work; there would be great hazard from fire; and with unlighted streets and lack of electrical energy for operation of police signals crime might create a major problem.

---



*B — Public utilities are virtually agencies of the State.*

In approaching this question we must bear in mind the unique nature of the public utility industry. In Wisconsin the operations of public utilities have been subject to state control and regulation for many years. The state not only determines what rates or fares the utility may charge, but it also determines and regulates the right to engage in or to discontinue operations, the quality and quantity of service to be rendered, the issuance of securities, the construction and expansion of facilities, and the manner and method of accounting. See opinion below, 257 Wis. 43, at 47.

Public utilities are virtually agencies of the State of Wisconsin and are delegated to carry out some of the sovereign powers of the state. For example, public utilities have been delegated the power of eminent domain. Section 32.02, Wisconsin Statutes. It has often been stated that eminent domain is an attribute of sovereignty. *Mississippi and R. R. B. Co. vs. Patterson*, 98 U. S. 403. Only because the state and its political subdivisions have not seen fit to engage directly in the public utility business, do we find private enterprise engaged in the business, and subject to broad and extensive governmental regulation.

Public utilities serve exactly the same functions regardless whether they are in private or public ownership. Therefore from a constitutional standpoint the decision in this case should be made on the basis of the same legal principles as would apply if all the public utilities of Wisconsin were owned and operated by the state.

This Court has consistently held that various constitutional guarantees do not impose restrictions upon the power of the individual states in the regulation of public utilities to the same extent as they may impose restrictions upon

the states in the regulation of ordinary business enterprises. An entirely different application has been given to constitutional provisions in respect to the power that a state may exercise over a public utility, its property and its employees, as compared to the power which a state may exercise over ordinary business ventures. Yet we find that the constitutional provisions do not contain any express language differentiating between the public utility business and ordinary business activities. If the courts may properly interpret general language in the Constitution as having a different application in respect to public utilities than in respect to ordinary business, why may not the Taft-Hartley Act have a similar interpretation?

If the Wisconsin legislature had enacted a statute directly fixing the wages of public utility employees, it could not well be doubted that such an act would be an appropriate exercise of legislative power. If the legislature in the exercise of its legislative function were to enact a statute prescribing a definite amount of wages and pensions to be paid by a public utility to all of its employees, and if it also definitely prescribed all conditions of employment, could it be reasonably maintained that such a statute would be invalid on the ground that it conflicted with the Taft-Hartley Act in that the employees had no opportunity to bargain in respect to wages, pensions and working conditions? If this is the correct interpretation of the Taft-Hartley Act it necessarily follows that even in respect to publicly owned public utilities, Congress could, from a constitutional standpoint, render a state legislature powerless to enact a law establishing wages, pensions or employment conditions for public utility employees.

C — *The Constitution was intended to create "an indestructible Union, composed of indestructible States."*

1. *It is improper to interpret the commerce clause as giving to Congress the power to destroy state government.*

The members of plaintiff Union and the individual plaintiffs are not engaged in interstate commerce. They are engaged solely in intrastate commerce. They contend, however, that their activities affect interstate commerce and therefore the State is without power to prescribe their wages and working conditions because to do so would conflict with the Taft-Hartley Act. If this be true it would seem that this Court has erred when it has declared that our Constitution looks to "an indestructible Union, composed of indestructible States." That every reasonably permissible presumption should be made against the deprivation of a government of its sovereign power is clearly indicated by the language of the Supreme Court in *Texas vs. White*, 7 Wall. 700, 725, as follows:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

If a state is to be powerless to exercise its police power as a means of protecting its right to insure the continuity of essential public utility services, it would seem that the rights of states are fictitious.

When the people gave to Congress the power to regulate interstate commerce did they thereby intend in effect to give Congress the power to destroy a state government by making it impossible for a state to regulate employees of an intrastate public utility engaged in furnishing the vital necessities of life in such state? If so, the statement that our Constitution created "an indestructible Union, composed of indestructible States" is mere rhetoric.

In holding that in the absence of express language a statute should not ordinarily be interpreted as a limitation upon a sovereign authority, the Court in *United States vs. United Mine Workers of America*, 330 U. S. 258, 272, said:

"There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. \* \* \* Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific (language) to that effect' if it actually intended to reach the Government in all cases."

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*D — A public utility employer has no bargaining power to meet the threat of a strike.*

Petitioner contends that the prohibition of the right to strike does violence to the entire concept of collective bargaining. Petitioner fails to appreciate that in the public utility industry, if the employees were allowed to strike, the employer has no bargaining power. If a strike were to interrupt the service of an electric utility, the employer

would doubtless have to accede to the union demands in less than 24 hours. The interruption of the service would so vitally affect every inhabitant of the community, and the ensuing public pressure would be so great, that the employer would have no choice but to capitulate immediately.

When we consider the very unique characteristics of the public utility industry, and further consider the disastrous effects of any interruption of a service rendered by a public utility, can it be argued that Congress, by recognizing in general terms the right of employees to engage in concerted activities, intended to foreclose to the states the power to assure the constant flow of the vital public utility services to its inhabitants.

---

*E — Congress has prohibited Federal employees from striking.*

Congress through the enactment of Section 305 of the Taft-Hartley Act made it unlawful for Federal employees to go on strike. 61 Stat. 160, 29 U. S. C. A. §188. Section 305 provides in part as follows:

“It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strikes.”

Congress undoubtedly felt that in order to prevent any interruption of the vital service rendered by the Federal Government and its agencies, it was necessary to prohibit strikes by Federal employees. Can it therefore be reasonably argued that by recognizing in Section 7 the right of employees to engage in “concerted activities,” Congress intended to deprive the states from enacting similar

measures to assure the continuity of vital services within their boundaries? When we consider that the states already possessed such power under the Tenth Amendment, it is apparent that it was not necessary that Congress grant such power to the states. To interpret the Act otherwise would be to say that Congress intended to discriminate against the states in favor of the Federal government.

---

*F — Congress has provided for injunctions against strikes which would imperil the national health and safety.*

1. *It was left to the states to take similar measures to cope with emergencies affecting the health and safety of their citizens.*

The "public utility anti-strike" law of New Jersey was held not to be in conflict with the Taft-Hartley Act in *In re New Jersey Bell Telephone Co.*, 26 LRRM 2585 (N. J. Sup. Ct., October 2, 1950). In this case it was the union who was seeking to uphold the statute and the company was attacking it. The court pointed out that Sections 206-210 of the Taft-Hartley Act provide for the enjoining of strikes which would imperil the national health or safety. 61 Stat. 154, 29 U. S. C. A. §§176-180. Were the states foreclosed from enacting similar measures to cope with local emergencies? In upholding the state statute, the court said:

"\* \* \* Our examination of the Federal Act discloses no provision therein which prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to



enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested,' *Allen Bradley Local vs. Wisconsin Employment Relations Board*, 315 U. S. 740, \* \* \* we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been pre-empted by Congress, and that the *O'Brien* case, *supra*, is inapplicable to the present situation."

As above pointed out Congress sought only to legislate with respect to emergencies imperiling the national health and safety. Certainly it was not the intent of Congress by so legislating to foreclose the states from taking measures to prevent emergencies confined within its own borders. Obviously Congress recognized that this was a field for state legislation.

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*G — Congress recognized that parties to labor disputes have no right to engage in practices which jeopardize the public health, safety, or interest.*

To properly construe Section 7 of the Federal Act, we must first look to the Congressional intent. In Section 1 entitled, "*Congressional declaration of purpose and policy*," we find in clear and unmistakable language the primary purpose which Congress sought to achieve, viz., "the free flow of commerce." Congress further declared that industrial strife which interferes with the normal flow of commerce can be avoided or substantially minimized if employers, employees, and labor unions "above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest." (Emphasis supplied) Another expressed purpose of the Act was "to protect the rights of the public in connection with labor disputes affecting commerce."

The Wisconsin law is in full accord with the expressly declared purpose and policy of the Taft-Hartley Act. The Wisconsin legislature had solely in mind "the public health, safety, or interest." The purpose of the Act was not to take away rights of the employees and employers of the public utility industry, but to protect the public. To accomplish this goal, the rights of the employers and employees necessarily had to be restricted.

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*H — Congress has not legislated beyond right of employees to be free from employer coercion.*

In commenting upon the fundamental purpose of the Wagner Act, Justice Frankfurter, in a dissenting opinion in *Hill vs. Florida*, 325 U. S. 538; declared:

"\* \* \* The whole plan or scheme of the Wagner Act was to enable employees to bargain on a fair basis, freed from 'restraint or coercion by their employer' through the protection given by the Federal government.

\* \* \* \* \*

*"All activities or aspects of labor organizations outside of their right to be free from employer coercion were left wholly unregulated by that Act. (Emphasis supplied)*

\* \* \* \* \*

"There is not a breath in the Act referring to any aspect of union activity unrelated to employer interference therewith. By refusing to legislate beyond that, Congress did not forbid the States from so legislating. \* \* \*" (pp. 558, 559)

Justice Frankfurter's above statement is equally applicable to the Taft-Hartley Act. The Wisconsin law in no respect infringes upon the right of employees to be free from employer coercion.

"We are unable to find any clear manifestation in the Taft-Hartley Act that the states were being excluded from exercising their police power to protect the public health and safety. On the contrary, as pointed out above, Congress expressly declared that neither employers or employees have any right "to engage in acts or practices which jeopardize the public health, safety, or interest." Section 1(b).

*1 — General terms should be interpreted so as not to lead to absurd results.*

To construe Section 7 of the Federal Act as foreclosing the State of Wisconsin from enacting this law to prevent the interruption of vital public utility services is to lead to an absurd result. One of the first and foremost canons for the interpretation or construction of words in a constitution or statute requires that the intention of the law-makers must control and when general language is used and a literal interpretation thereof would result in absurd consequences, such general language is not to be given a literal interpretation. In *Jacobson vs. Massachusetts*, 197 U. S. 643, 655, this Court set forth this familiar rule as follows:

“‘All laws,’ this court has said, ‘should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.’”

In *Church of the Holy Trinity vs. United States*, 143 U. S. 226, 228, this Court said:

“It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”

In *United States vs. American Trucking Association*, 310 U. S. 534, this Court declared as follows:

“Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words.”

It is inconceivable that Congress intended that a state should be powerless to adequately protect its citizens from the dire consequences that inevitably follow from a public utility strike.

General terms in a constitution are likewise subject to limitation. For example, the right of freedom of speech is qualified, *Carpenters Union vs. Ritter's Cafe*, 315 U. S. 722; and this Court has declared that “without such limitation, it might be the scourge of the republic.” *Gitlow vs. New York*, 268 U. S. 652. The constitutional right of freedom of contract is not an absolute right. *Mvan vs. Illinois*, 94 U. S. 113.

If general words in constitutional guaranties are subject to limitations and qualifications, certainly general words appearing in the Taft-Hartley Act are equally subject to limitations as a means of carrying out the intent and purpose that prompted the passage of the law.

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*J — Congress has made it clear that the right to strike is limited.*

An examination of the legislative history of Section 13 of the Taft-Hartley Act clearly shows that the right to strike as set forth in Section 7 is a qualified right.

The Taft-Hartley Act amended Section 13 of the Wagner Act by adding the italicized words, so it now reads:

*“Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitation or qualification on that right.”* (Emphasis supplied)

The Report of the Committee of Conference includes the following statement with respect to the amendment of Section 13:

*“The Senate amendment also added one other important provision to this section, providing that nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right. The conference agreement adopts the provisions of the Senate amendment. \* \* \*”* (Emphasis supplied) House Report No. 510, June 3, 1947 (U. S. Code Congressional Service, 80th Congress, First Session, 1947, pages 1165-1166).

We are not to be left to conjecture as to the interpretation to be given to Section 13. The Court in the *Briggs & Stratton* case, 336 U. S. 245, held that the Wisconsin board could order the union to cease and desist from instigating intermittent and unannounced work stoppages. In the course of the opinion, Justice Jackson, speaking for the majority of the Court, said:

*“\* \* \* Unless we read into §13 words which Congress omitted and a sense which Congress showed no intention of including, all that this provision does is to declare a rule of interpretation for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other*



*laws. It did not purport to modify the body of law as to the legality of strikes as it then existed. This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike,' Dorchy vs. Kansas, 272 U. S. 306, 311, 71 L. Ed. 248, 269, 47 S. Ct. 86.'* (Emphasis supplied)

\* \* \* \*

“\* \* \* That Congress has concurred in the view that neither §7 nor §13 confers absolute right to engage in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the Courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike. \* \* \*” (See full text of Committee Report at Note 15, 336 U. S. 245, 260)

On page 6540 of Volume 93 of the Congressional Record (Legislative History, p. 883) statements made by Congressman Hartley, a co-author of the bill, in response to an inquiry by Wisconsin's Congressman Kersten, are set forth as follows:

“Mr. Kersten of Wisconsin: \* \* \*

‘I would like to ask the gentleman about that portion which pertains to the validity of state laws. We are very anxious that disputes be settled at the state level so far as it is possible. Can the gentleman give us assurance on that proposition, so that

it is a matter of record, that that is the sense of the language and of the report?"

"Mr. Hartley:

"That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.' "

The statements of Mr. Hartley clearly indicate that Congress was aware of the importance of permitting states to continue to exercise their traditional police powers concerning such labor practices as the states may regard as inimical to the public welfare.

When we start with the premise that the right to strike is not absolute but is a qualified right, and further consider the express declared purpose and policy of the Federal Act, and also the fundamental canon of construction that general terms must be so construed so as not to lead to absurd results, it seems quite clear that the Wisconsin law does not conflict with the Federal Act, but goes beyond the scope of the latter and covers a field intended by Congress to be left to the states.

---

*K — The O'Brien case is not applicable to the present issues.*

Petitioner contends that *International Union vs. O'Brien*, 94 L. ed. 659 (October Term, 1949), is completely determinative of the issue. The Michigan statute involved in that case was a general labor relations law and applied to all employees and employers generally. The Wisconsin

law is narrowly confined to a single industry, and only applied under certain circumstances. The Michigan act required a majority vote of all of the members of the bargaining unit before a strike could be called, whereas the Taft-Hartley Act has no such requirement. Thus, under the Michigan law, no group of employees in *any* industry or business within the state, regardless of whether it affected interstate commerce or not, could strike unless such majority vote was first obtained.

The Wisconsin statute, on the other hand, is narrowly confined to a single industry, and only applies under certain circumstances. The act only prohibits those strikes which would "cause an interruption of an essential service." Thus the act does not flatly prohibit *all* strikes in public utilities. If the service could continue to be furnished, notwithstanding a strike among some of the employees, such a strike would not be within the prohibition of the act.

It is of the utmost importance to bear in mind the distinction between a broad, all-inclusive statute and a narrow statute which is confined to a concrete situation. See *Milk Wagon Drivers U. vs. Meadowmoor Dairies*, 312 U. S. 287 at 297. When we consider that the requirement of this Michigan act, with respect to a majority vote being a condition precedent to a strike, applied to *all* employers and employees, and further consider that ~~the~~ Taft-Hartley Act has no such requirement, it is not difficult to see why this Court in the *O'Brien* case held such a sweeping piece of legislation to be indirect and irreconcilable conflict with the Federal law. The *O'Brien* case was held not to be applicable in *In re New Jersey Bell Tel. Co.*, 26 LRRM 2585.

This Court in the *O'Brien* case said that *International Union vs. Wisconsin E. R. Board* was not controlling because that case "was not concerned with a traditional, peaceful strike." It is submitted that a strike in a public utility industry is similarly not "a traditional, peaceful strike." True, there may be no violence whatsoever on the part of the striking workers, but the inevitable results of a public utility strike are of such a grave consequence, in fact they give rise to a state of emergency, that it cannot be said such strikes are of the traditional, peaceful nature.

---

*L — Certification by the National Board does not deprive a state of its police power.*

Petitioner seems to place great weight on the fact that the union had been certified by the National Board. We submit that this factor is wholly immaterial to the issues here presented. This Court in *Algoma P. & V. vs. Wisconsin E. R. Board*, 336 U. S. 301, said:

"The character of activities left to State regulation is not changed by the fact of certification."

---

*M — The compulsory arbitration procedure of the Wisconsin law comes into play only when collective bargaining has failed.*

(1) Petitioner asserts at page 13 of its brief that the compulsory arbitration feature of the Wisconsin law destroys good faith collective bargaining. On the contrary, we submit that it creates a real incentive for good faith bargaining because unless both parties can come to an

agreement by voluntary negotiation, the matter will be taken out of their hands entirely and be determined by the state through a statutory tribunal.

Because Wisconsin has determined that strikes in public utilities are against the public policy of the state, it had to select a substitute for this coercive method of collective bargaining. Certainly the selection of compulsory arbitration, to come into play only when collective bargaining has reached an impasse, was a reasonable one. It is the only feasible way to break an impasse, and at the same time assure the constant rendition of the vital public utility services. If the state through its police powers can prohibit strikes which threaten to interrupt essential public utility services, it only logically follows that it may provide for compulsory arbitration as an alternative.

(2) The statements of Senator Taft which petitioner has quoted in its brief are not persuasive to petitioner's position. They only go to show that Congress did not want to provide for compulsory arbitration on a nation-wide scale. By not adopting compulsory arbitration for all industries, does it necessarily follow that Congress intended that a state was foreclosed from providing for it in a single industry—one in which it was against the public policy of the state to permit strikes? Clearly Congress had no such intention. We are not dealing here with a competitive industry operated as a free enterprise, but with a public utility industry which has for years been closely regulated by the state.

(3) Petitioner states at page 18 of its brief that under the Wisconsin act the state board, before invoking the arbitration procedure, must first make a determination that the parties have bargained in good faith. Petitioner then

argues that this conflicts with the superior jurisdiction of the National Board to make such determination. On the contrary, under the Wisconsin law the board only has to make a finding that the collective bargaining process has reached an impasse and stalemate, and that such dispute will cause an interruption of an essential service. Section 111.54 provides in part:

“ \* \* \* Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, *notwithstanding good faith efforts on the part of both sides to such dispute*, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. \* \* \* ”  
(Emphasis supplied)

Obviously the phrase “notwithstanding good faith efforts” does not mean the board must find that the parties have bargained in good faith. Paraphrased, it means that if the board finds that an impasse has been reached, *even though there have been good faith efforts*, it shall appoint a conciliator.

(4) At page 19 of its brief, petitioner asserts that by virtue of Section 111.58, the state has removed from the jurisdiction of the arbitrators, those matters over which the employer and union must bargain collectively. Section 111.58 provides:

“The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.”



Petitioner has given this section a very broad and liberal interpretation. Obviously the legislature did not intend to remove from the jurisdiction of the arbitration those matters, such as wages, hours, and conditions of employment, which are universally regarded as proper subjects for collective bargaining. If such was the intention, the entire act would be meaningless. Clearly the legislature intended only to prohibit the arbitrators from passing on those subjects which are not usually regarded as proper subjects for collective bargaining.

---

### III.

#### *The Wisconsin Law Is Not in Violation of the Fourteenth Amendment.*

(a) It is argued by petitioners at page 20 that the Wisconsin law is in violation of the Due Process Clause because it is in essence an attempt by the legislature to establish wages, hours, and working conditions of the public utility employees. Petitioner relies on *Wolff Packing Co. vs. Court of Industrial Relations*, 262 U. S. 522. The state law in question in the *Wolff* case applied broadly to a great variety of private industries. The plaintiff was a meat packing company. Because of its broad coverage the act was held invalid. However, in *Wilson vs. New*, 243 U. S. 332, it was held that such a law was proper when it applied only to a public utility.

Moreover, the philosophy of the *Wolff* case has long been rejected. *Nebbia vs. New York*, 291 U. S. 502; *West Coast Hotel Co. vs. Parrish*, 300 U. S. 379. This Court in *Lincoln Union vs. Northwest Co.*, 335 U. S. 525, said:

“That the due process clause does not ban legislative power to fix prices, wages and hours as was assumed in the *Wolff* case, was settled as to price fixing in the *Nebbia* and *Olsen* cases. That wages and hours can be fixed by law is no longer doubted since *West Coast Hotel Co. vs. Parrish*, 300 U. S. 379; *United States vs. Darby*, 312 U. S. 100, 125; *Phelps Dodge Corp. vs. Labor Board*, 313 U. S. 177, 187.”

(b) The mere fact that the Wisconsin law does not include railroad employees is clearly immaterial. Obviously the legislature must have reasoned that the steam railroads in Wisconsin were already subject to adequate federal regulation.

(c) There is nothing indefinite and vague about the provisions of the Wisconsin act. Certainly any reasonable person could ascertain whether a proposed strike would cause an “interruption” of an essential service. The legislature could not have selected any clearer terminology.

---

#### IV.

##### *The Wisconsin Law Does Not Impose Involuntary Servitude.*

Petitioner's contention that the Thirteenth Amendment is violated is answered by the express provisions of the act itself. Section 111.64 of the Wisconsin Statutes expressly provides that the act does not require any individual employee to work without his consent, and that he

can quit his work at any time. In *Van Riper vs. Traffic Tel. Workers Fed. of N. J.*, 61 Atl. 2d 570 (N. J. Chancery, 1948), reversed in 61 Atl. 2d 616 (N. J. 1949) on other grounds, the court answered the challenge that the New Jersey "public utility anti-strike law" violated the Thirteenth Amendment, as follows:

"What preserves the employee's liberty under the constitution is not collective bargaining but is the right of the individual to refuse to work for the Telephone Company. \* \* \*"

---

### CONCLUSION.

There are no special and important reasons for the review of this case by this Court. The action which is the subject of this petition was one to review and set aside an order of arbitrators. By operation of law this arbitration order expired in April, 1950. Petitioner is asking this Court to review a moot question.

The Wisconsin Supreme Court has not determined a novel question. The subject matter, that of alleged conflict between the state and national labor legislation, has been adjudicated by this Court time and time again. Nothing new will be gained in the way of precedent by a review of this case. The Wisconsin Court rendered its decision fully in accord with the applicable decisions of this Court.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARTIN R. PAULSEN,  
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Of Counsel.

**APPENDIX A.**

---

**SUPREME COURT OF THE UNITED STATES**

**October Term, 1950**

**No. 330**

---

**AMALGAMATED ASSOCIATION OF STREET,  
ELECTRIC RAILWAY AND MOTOR COACH  
EMPLOYEES OF AMERICA, DIVISION 998,  
GEORGE KOECHER and CHARLES BREHM,**

**Petitioners,**

**vs.**

**WISCONSIN EMPLOYMENT RELATIONS  
BOARD, et al.,**

**Respondents.**

---

**STATE OF WISCONSIN     )  
                                      ) SS  
Milwaukee County     )**

**J. H. LUCAS**, being first duly sworn on oath deposes and says: that he is the Vice-President of The Milwaukee Electric Railway & Transport Company, one of the respondents in the above entitled action; that after said action was appealed from the Circuit Court for Milwaukee

County, Wisconsin, to the Supreme Court of the State of Wisconsin, and after said cause was orally argued before said latter Court on the 3rd day of April, 1950, but before the judgment of said Court was entered on the 2nd day of May, 1950, the Petitioner herein and the Respondent, The Milwaukee Electric Railway & Transport Company, entered into a contract on the 7th day of April, 1950, effective as of the 1st day of April, 1950, in which was prescribed the wages, hours, and other conditions of employment; that said contract by its terms binds the parties thereto until the 30th day of September, 1951.

Affiant further avers that this affidavit is made for the purpose of establishing that the principal issues as stated in Petitioner's brief are now moot questions.

....(signed).....J. H. LUCAS.....

Subscribed and sworn to before me  
this ....12th.... day of October, 1950.

.....Eunice M. Roberts.....

Notary Public, Milwaukee County, Wis.

My commission expires .....Dec. 20, 1953.....

(Notarial Seal)





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CLERK

**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1950**

**No. 330**

**AMALGAMATED ASSOCIATION OF STREET, ELECTRIC  
RAILWAY AND MOTOR COACH EMPLOYEES OF  
AMERICA, DIVISION 998, GEORGE KOECHEL and  
CHARLES BREHM, Individually and in Their Representative  
Capacity,**

*Petitioners,*

*vs.*

**WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E.  
GOODING, HENRY RULE and J. E. FITZGIBBON, In-  
dividually and as Members of the Wisconsin Employment Relations  
Board; CARL LUDWIG, H. HERMAN RAUCH and MAR-  
TIN KLOTSCH, Individually and as members of a Board of  
Arbitration, and THE MILWAUKEE ELECTRIC RAILWAY  
& TRANSPORT COMPANY, a Wisconsin Corporation,**

*Respondents.*

**On a Writ of Certiorari to the  
Supreme Court of the State of Wisconsin**

**BRIEF FOR THE RESPONDENT**

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IN THE  
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OCTOBER TERM, 1950

No. 330

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& TRANSPORT COMPANY, a Wisconsin Corporation,

*Respondents.*

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On a Writ of Certiorari to the  
Supreme Court of the State of Wisconsin

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**BRIEF FOR THE RESPONDENT**

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**OPINION BELOW**

The opinion of the Wisconsin Supreme Court (R. 235-237) is reported at 257 Wis. 53. The opinion of the circuit court (R. 101-106) is not reported.

**JURISDICTION**

The judgment of the Wisconsin Supreme Court was entered May 2, 1950. (R. 234) A motion for rehearing

was denied on June 30, 1950. (R. 239) The jurisdiction of this Court is invoked under Section 1257(3) of Title 28, U.S.C.

### QUESTIONS PRESENTED

1. Whether a State may by statute prohibit strikes which threaten to interrupt an essential public utility service.
2. Whether a State, having prohibited strikes in such cases, can require that labor disputes be settled by arbitration when they have reached an impasse.

### STATE STATUTES INVOLVED

The State statutes involved are printed in Appendix A to the petitioner's brief.

### STATEMENT OF CASE

In addition to the facts stated in petitioner's brief, we add the following: After the case below was presented by briefs and oral argument to the Wisconsin Supreme Court, the Union and the Company entered into a labor contract on April 7, 1950, effective as of April 1, 1950, said contract not to expire until September 30, 1951. (Appendix A, of this Respondent's Brief in Opposition to Petition for a Writ of Certiorari.)

Petitioner in the companion case (No. 329) in its statement of facts (p. 9) makes the statement that the employer's final offer during the conciliation was less favorable to the union than any offer it had previously made (R. 143). This statement was merely an allegation in defendant's (petitioner's) answer, and was not found as a fact.

The Union gave only a few hours notice to the Company and the public that they were going to go out on strike. (R. 132, Case No. 329).

The members of the union did in fact go out on strike on the morning of January 5, 1949. At 9:00 A.M. on that day all of the Company's vehicles were off the streets. (R. 136, Case No. 329).

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## ARGUMENT

### I.

#### THE PRINCIPAL ISSUES PRESENTED BY THE PETITION ARE NOW MOOT

In petitioner's brief under the title "*Question Presented*," the principal question set forth is as follows:

"Whether a State may by statute require employees of a 'public utility' employer to submit disputes regarding contract terms to arbitration and to be bound by the results of such arbitration for a period of one year, the same statute making it a criminal offense for such employes to strike."

We submit that this question has become moot, and therefore is no longer open to adjudication. The nature of this suit was an action to review and set aside an order of the arbitration board. Section 111.59 of the Wisconsin Statutes provides that the order of the arbitration board shall "continue effective for one year from that date (the date filed with the Clerk of Circuit Court), but such order may be changed by the mutual consent or agreement of the parties." The order of the arbitration board was issued on April 9, 1949, and was filed with the Clerk of the Circuit Court for Milwaukee County on April 11, 1949. (R. 222) By virtue of Section 111.59 the order became ineffective on April 11, 1950, unless changed by

agreement of the parties. The parties entered into a contract on April 7, 1950, to run for 18 months (Appendix A, Respondent's Brief in Opposition to Petition for Writ of Certiorari), which by operation of law rendered the arbitration order ineffectual. Thus there is no longer any occasion to challenge the power of the state to require public utility employers and employees to submit to arbitration. No justiciable controversy now exists in which petitioners can challenge the state's power. This Court has no jurisdiction to pass on a federal question that is moot. *Kimball v. Kimball*, 174 U.S. 158; *Little v. Bowers*, 134 U.S. 547.

The issue in the companion case is likewise moot. The arbitration order is no longer in effect. The parties voluntarily entered into a contract on April 7, 1950, which will not expire until September 30, 1951. (Appendix A). The parties are no longer proceeding under the Wisconsin law in question. They are now carrying on under a labor contract conclusively presumed to be acceptable to both. Petitioner is no longer in a position to attack the injunction.

## II.

### THE WISCONSIN ACT IS NOT IN CONFLICT WITH THE TAFT-HARTLEY ACT

Petitioner's principal contention is that Chapter 414, Wisconsin Laws of 1947, is invalid because of alleged conflict with the Labor Management Relations Act, 61 Stats. 136, U.S.C.A. §§141-197, more commonly referred to as the Taft-Hartley Act. Petitioner more particularly urges that the prohibition of the right to strike by public utility employees and the substitution therefor of the compulsory arbitration procedure (if conciliation should

prove to be futile) is a direct infringement of the employees' right "to engage in other concerted activities for the purpose of collective bargaining," as set forth in Section 7 of the Federal Act.

To answer this contention it should be noted at the outset that the right to strike is not an absolute and unqualified right. *International Union v. Wisconsin E. R. Board*, 336 U.S. 245; *Allen-Bradley Local v. Wisconsin E. R. Board*, 315 U.S. 740.

Section 7 of the Taft-Hartley Act recognizes the right of employees to engage in "concerted activities." Did Congress by the use of this general term intend to take away from a state its power to protect its inhabitants in respect to the maintenance of essential public utility services? We contend that Congress had no such intention. This Court has said that "the intention of Congress to exclude the States from exercising their police power must be clearly manifested," and that the Court "will not lightly infer that Congress by the mere passage of a Federal Act has impaired the traditional sovereignty of the several states in that regard." *Allen-Bradley Local v. Wisconsin E. R. Board*, *supra*; *International Union v. Wisconsin E. R. Board*, *supra*.

#### A. Background.

1. The Wisconsin Legislature sought to protect the public from the dire consequences that result from the interruption of an essential public utility service.

Chapter 414 of the Wisconsin Laws of 1947 prohibits employees of public utilities from striking and requires them and their employers to submit their labor disputes to arbitration, when they reach an impasse or stalemate.

The legislature included in the Act a declaration of public policy. In this declaration it is declared that it is necessary and essential to the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees. It is recognized in the declaration that interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the employers and employees. The legislative declaration of policy as set forth in the statute is as follows:

"111.50 *Declaration of policy.* It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employees which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employees, and to provide settlement procedures for labor disputes between public utility employers and their employees in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare."

In the enactment of this statute it is apparent that the legislature took into consideration the dire consequences



that may result from the interruption of essential public utility services. The facts hereinafter stated are matters of common knowledge and doubtless they among others served as an inducement for the passage of this law. Electrical energy supplied by public utility companies, among a multitude of other uses, is used for the following purposes:

- (1) To pump water for purposes of human consumption, sanitation and to afford fire protection;
- (2) To pump sewage incident to the disposal of sewage by metropolitan sewage disposal plants;
- (3) To operate oil burners used to heat homes, factories and offices;
- (4) To heat domestic hot water;
- (5) To heat buildings in metropolitan downtown areas where the heat is supplied from a central steam system, which heat constitutes a by-product of the generation of electricity;
- (6) To furnish light in homes, offices and factories;
- (7) To light public streets and thoroughfares;
- (8) To cook and prepare food upon electric ranges;
- (9) To supply power for the operation of factories and commercial enterprises;
- (10) To operate traffic control signals and fire and police alarms;
- (11) To operate airport signals and furnish airport lighting;
- (12) To operate railroad safety signals;
- (13) To operate X-ray machines and other hospital equipment and appliances;
- (14) To operate and propel street cars and trackless trolleys;

(15) To operate elevators in multiple-storied buildings; and,

(16) To supply the farmer with power essential to the operation of water pumps, milking machines and various kinds of farm equipment.

It does not require a high degree of imagination to realize the consequences that may be incident to the interruption of electric service. Many thousands of homes would be unheated; it would be impossible to properly cook and prepare foods for human consumption; there would be no adequate water supply for human consumption or for purposes of sanitation; practically all of the large industrial factories would be required to close their doors because of lack of power to operate the same and as a result many thousands of employes would be thrown out of work; there would be great hazard from fire; and with unlighted public streets and lack of electrical energy for operation of police signals crime might create a major problem.

Never in the history of the world has society been as complex as it is today or as dependent upon public utility services for the everyday necessities of life. Homes, factories and offices are all constructed and equipped in such manner as to require electrical energy for their proper maintenance and operation. Disease, famine, crime and fire may be expected to follow the interruption of electric service in densely populated areas.

That the needs and the rights of the public incident to the essential services of public utilities constitute the dominant factors involved in the enactment of this statute cannot well be doubted. The employers and employes involved in furnishing such essential services are engaged in businesses affected by a public interest. The law was

not enacted to confer special benefits upon either the employers or the employes it was enacted to benefit and protect the rights of the public who are innocent victims when a strike occurs involving the essential services of a public utility.

Wisconsin is not alone in its efforts to safeguard its inhabitants from interruptions in essential public utility. Ten other states have enacted comparable legislation.<sup>1</sup>

○ In practically all of these statutes we find an express legislative declaration to the effect that the continuous and uninterrupted operation of public utilities is *essential* to the welfare, health, and safety of the citizens, and that it is contrary to the public policy of the state to permit any substantial interruption of such services. This is a clear indication that these states in the enactment of these statutes were solely seeking to protect their citizens and any restrictions on employers and employes were merely incidental.

## 2. Public Utilities are virtually agencies of the state.

In approaching this question we must bear in mind the unique nature of the public utility industry. In Wisconsin the operations of public utilities have been subject to state control and regulation for many years. The state not only determines what rates or fares the utility may charge, but it also determines and regulates the right to engage in or to discontinue operations, the quality and quantity of service to be rendered, the issuance of secur-

<sup>1</sup> Florida Laws (1947), Chapter 23,911; Indiana Act (1947), Chapter 341; Kansas, General Statutes (1935), Chapter 44, Article 6; Massachusetts, Annotated Laws (1947), Chapter 150 B; Michigan Statutes Annotated (1947), Section 17,454; Nebraska Laws (1947), Chapter 178; New Jersey Laws (1947), Chapter 75; North Dakota Revised Code, Para. 37-0106; Pennsylvania Laws (1947), No. 485; Virginia Acts (1947), Chapter 9.

ities, the construction and expansion of facilities, and the manner and method of accounting. See opinion below, 257 Wis. 43, at 47.

In a very recent case involving the same issue as is here presented, the Wisconsin Supreme Court stated:

" \* \* \* Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that *the utilities are state agencies*. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers. Under a proper interpretation of the federal act, the state is still sovereign in the field covered by the public utility anti-strike law. The federal act makes provision for national emergencies, but it does not and cannot legislate in the field of local emergencies." (Emphasis supplied) *Wisconsin E. R. Board v. Milwaukee Gas Light Co.*, 44 N.W. 2d 547 (Nov. 8, 1950)

Public utilities as agencies of the State of Wisconsin have been delegated to carry out some of the sovereign power of the state. For example, public utilities have been delegated the power of eminent domain. Section 32.02, Wisconsin Statutes. It has often been stated that eminent domain is an attribute of sovereignty. *Mississippi and R. R. B. Co. v. Patterson*, 98 U.S. 403. No ordinary private industry possesses such power. The exercise of this great power has not been conferred upon public utilities to benefit the stockholders but has been conferred upon them as instrumentalities or agencies of the state for the benefit of the public. Public utilities in Wisconsin are virtually an arm of the state. Only because the state and its political subdivisions have not seen fit to engage directly in the public utility business, do we find private enterprise engaged in the business, and

subject to broad and extensive governmental regulation. All public utilities in Wisconsin have been operating for many years under what is commonly called the Indeterminate Permit Law. Sections 193.34 et. seq. (street railways) ; Chapter 197, and Section 196.57 (other utilities). In general, all utilities have by operation of law consented to municipal acquisition of their plants and facilities whenever a municipality by the majority vote of its electorate has determined to acquire said plant and facilities. The right of a finding of necessity by a jury has been waived. All that remains to be done is a determination of the compensation to be paid to the utility.

The welfare of the state and of its citizens is directly involved in the continuous operation of the public utilities created and regulated by the state. The fact that a public utility may be privately owned rather than publicly owned is unimportant. Public utilities serve exactly the same functions regardless whether they are in private or public ownership. Therefore from a constitutional standpoint the decision in this case should be made on the basis of the same legal principles as would apply if all the public utilities of Wisconsin were owned and operated by the state. The public utility business is not an ordinary business,—it is a business peculiarly affected by a public interest. The activities of a public utility publicly owned affect interstate commerce in precisely the same manner as the activities of such utility would affect such commerce if the utility were in private ownership.

This Court has consistently held that various constitutional guarantees do not impose restrictions upon the power of the individual states in the regulation of public utilities to the same extent as they may impose restrictions upon the states in the regulation of ordinary business



enterprises. For example, the Constitution guarantees freedom of contract, privacy, due process of law, equal protection of the law, as well as many other rights. An entirely different application has been given to constitutional provisions in respect to the power that a state may exercise over a public utility, its property and its employees, as compared to the power which a state may exercise over ordinary business ventures. Yet we find that the constitutional provisions do not contain any express language differentiating between the public utility business and ordinary business activities. The general language contained in these constitutional provisions has been interpreted by this Court to mean one thing when applied to the power of a state over its public utility businesses and quite another thing when applied to the power of a state over ordinary business activities. If the courts may properly interpret general language in the Constitution as having a different application in respect to public utilities than in respect to ordinary business, why may not the Taft-Hartley Act have a similar interpretation? Certainly it is not more sacred nor free from interpretation than the Constitution of the United States.

The constitutional guarantee of freedom of contract has been interpreted as a restriction upon the power of a state to fix prices (except under unusual circumstances) to be charged by persons engaged in ordinary businesses but it has been held to impose no such restriction in respect to the prices which a public utility may charge for its services. *Munn v. Illinois*, 94 U.S. 113. Why may not the Taft-Hartley Act be given a comparable interpretation?

If the Wisconsin legislature had enacted a statute directly fixing the wages of public utility employees, it could not well be doubted that such an act would be an appropriate exercise of legislative power. The fact that



the legislature has delegated this function to a state tribunal when the parties are unable to agree upon such wages does not mean that it thereby loses the character of a legislative function. It has been held that the power of a state to prescribe the rates which a public utility shall be permitted to charge for the services it renders is a legislative function, regardless whether the legislature acts directly in the matter or delegates it to an administrative tribunal. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1. If the legislature in the exercise of its legislative function were to enact a statute prescribing a definite amount of wages and pensions to be paid by a public utility to all of its employes, and if it also definitely prescribed all conditions of employment, could it be reasonably maintained that such a statute would be invalid on the ground that it conflicted with the Taft-Hartley Act in that the employes had no opportunity to bargain in respect to wages, pensions and working conditions? If this is the correct interpretation of the Taft-Hartley Act it necessarily follows that even in respect to publicly owned public utilities, Congress could, from a constitutional standpoint, render a state legislature powerless to enact a law establishing wages, pensions, or employment conditions for public utility employes. Whether a state legislature itself prescribes wages, pensions or working conditions, or delegates such function to a subordinate or administrative body (i.e., arbitrators) is quite immaterial because in either case it represents the action of the state. *Knoxville v. Knoxville Water Co.*, *supra*. In the *Knoxville Water Co.* case, this universally recognized rule was stated as follows:

"Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom

the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power." (p. 378)

It is with this background in mind that we approach the question of conflict with the Taft-Hartley Act.

**B. The Constitution was intended to create "an indestructible Union, composed of indestructible States."**

1. It is improper to interpret the commerce clause as giving to Congress the power to destroy state governments.

The members of plaintiff Union and the individual plaintiffs are not engaged in interstate commerce. They are engaged solely in intrastate commerce. They contend, however, that their activities affect interstate commerce and therefore the State is without power to prescribe their wages and working conditions because to do so would conflict with the Taft-Hartley Act. If this be true it would seem that this Court has erred when it has declared that our Constitution looks to "an indestructible Union, composed of indestructible States".

That every reasonably permissible presumption should be made against the deprivation of a government of its sovereign power is clearly indicated by the language of the Supreme Court in *Texas v. White*, 7 Wall. 700, 725, as follows:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution

as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

If a state is to be powerless to exercise its police power as a means of protecting its right to insure the continuity of essential public utility services, it would seem that the rights of states are fictitious. This Court has recognized on numerous occasions that it would be contrary to the intention of the framers of our Constitution if the federal government were to be permitted to swallow up and destroy state governments. Acting upon this basic principle it was, at an early date, held that because "the power to tax is the power to destroy" neither the federal government nor the state governments should be allowed to tax governmental instrumentalities of the other. *Collector v. Day*, 11 Wall. 113; *McCulloch v. Maryland*, 4 Wheat. 316.

Both the federal government and the state governments admittedly have the power to tax and there is no express language in the Constitution which prohibits either from taxing the governmental instrumentalities of the other. When the people gave to Congress the power to regulate interstate commerce did they thereby intend to in effect give Congress the power to destroy a state government by making it impossible for a state to regulate employes of an intrastate public utility engaged in furnishing the vital necessities of life in such state? If so, the statement that our Constitution created "an indestructible Union, composed of indestructible States" is mere mockery.

Under our form of government sovereignty is divided between the federal government and the state governments. It has been called a dual form of sovereignty. Each exercises sovereign prerogatives. In holding that

in the absence of express language a statute should not ordinarily be interpreted as a limitation upon a sovereign authority, the Court in *United States v. United Mine Workers of America*, 330 U.S. 258, 272, said:

"There is an old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect. \* \* \* Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific (language) to that effect' if it actually intended to reach the Government in all cases."

The following statement appears in a footnote to the above opinion:

"The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him (the sovereign) in the least, if they may tend to restrain or diminish any of his rights or interests." *Dollar Sav. Bank v. United States*, 19 Wall (U.S.) 227, 239, 22 L. ed. 80, 82 (1873). "If such prohibition is intended to reach the government in the use of known rights and remedies, the language must be clear and specific to that effect." *United States v. Stevenson*, 215 U.S. 190, 197, 54 L. ed. 153, 156, 30 S. Ct. 35 (1909)

C. The Wisconsin Act is fully in accord with the intent of Congress in enacting the Taft-Hartley Act.

1. Congress recognized that parties to labor disputes have no right to engage in practices which jeopardize the public health, safety, or interest.

Under its constitutional power "To regulate commerce \* \* \* among the several states", (Sec. 8, Art. I, U.S.

Const.) Congress enacted what is commonly known as the Wagner Act which in 1947 was superseded by the so-called Taft-Hartley Act, otherwise known as the Labor Management Relations Act of 1947. Section 7 of the latter Act has considerable language which is identical with language in Section 7 of the former Act. Section 7 of the Wagner Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *concerted activities*, for the purpose of collective bargaining or other mutual aid or protection." (Emphasis supplied)

Section 7 of the Taft-Hartley Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (Emphasis supplied)

Petitioners contend that compulsory arbitration of labor disputes and the prohibition of strikes by employees engaged in essential services of public utilities constitute a violation of the provisions of Section 7 of the Taft-Hartley Act as above set forth.

Respondent Transport Company recognizes that a state cannot by its legislative enactments supersede or nullify statutes of the National Congress which have been duly enacted pursuant to constitutional authority; however, it



contends that there is no conflict between Chapter 414, Wisconsin Laws of 1947, and Section 7 of the Taft-Hartley Act when those statutes are properly construed.

It has often been stated that the intention of the Congress in the enactment of a statute is the polar star that must serve as the guide for the interpretation and construction of such statute. To properly construe Section 7 of the Taft-Hartley Act it therefore becomes necessary to consider the purpose or purposes which motivated Congress in the enactment of this statute.

Fortunately we are not in the dark on this subject because in Section 1 of the Taft-Hartley Act entitled "Short Title and Declaration of Policy" we find in clear and unmistakable language the primary objective which Congress sought to achieve, viz., "the free flow of commerce." Congress further declared that industrial strife which interferes with the normal flow of commerce can be avoided or substantially minimized if employers, employees, and labor unions "*above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.*" (Emphasis supplied). Another expressed purpose of the Act was "to protect the rights of the public in connection with labor disputes affecting commerce."

Here is express recognition that all parties to labor disputes have no right to engage in acts which jeopardize the public health, safety, or interest. What act by a labor union could more seriously and vitally affect the public health and safety than a public utility strike? Clearly the Wisconsin law is in full accord with the expressly declared purposes and policies of the Taft-Hartley Act. The Wisconsin Act was designed "to protect the rights



of the public in connection with labor disputes." The Wisconsin legislature had solely in mind "the public health, safety, or interest." The purpose of the Act was not to take away rights of the employes and employers of the public utility industry, but to protect the public. To accomplish this goal, the rights of the employers and employes necessarily had to be restricted. Neither was given any advantage.

2. Congress has not legislated beyond the right of employes to be free from employer coercion.

(a) The Wisconsin Law has not infringed upon this right.

In commenting upon the fundamental purpose of the Wagner Act, Justice Frankfurter, in a dissenting opinion in *Hill v. Florida*, 325 U.S. 538, declared:

" \* \* \* It is an accurate summary of the Wagner Act to say that it aimed to equalize bargaining power between industrial employees and their employers by putting Federal law behind the employees' right of association. The whole plan or scheme of the Wagner Act was to enable employees to bargain on a fair basis, freed from 'restraint or coercion by their employers' through the protection given by the Federal government.

\* \* \* \*

*"All activities or aspects of labor organizations outside of their right to be free from employer coercion were left wholly unregulated by that Act. (Emphasis supplied).*

\* \* \* \*

"It wipes out State power and distorts Congressional intention to disregard the limited policy explicitly set forth by Congress. That policy—curbing of employer interferences with union rights—was scrupulously observed by Congress in the substantive

provisions as well as in the enforcement structure of the Act. There is not a breath in the Act referring to any aspect of union activity unrelated to employer interference therewith. By refusing to legislate beyond that, Congress did not forbid the States from so legislating. \* \* \* (p. 558, 559)

Justice Frankfurter's above statement is equally applicable to the Taft-Hartley Act. The Wisconsin law in no respect infringes upon the right of employes to be free from employer coercion. This right is wholly untouched by the Wisconsin law. Employers have not been given any additional rights under the Wisconsin law. In fact, employers under the Act are prohibited from locking out employes. Section 111.62. The Wisconsin law covers the field in which Congress did not act. This field was left open to state legislation.

We are unable to find any clear manifestation in the Taft-Hartley Act that the states were being excluded from exercising their police power to protect the public health and safety. On the contrary, as pointed out above, Congress expressly declared that neither employers nor employes have any right "to engage in acts or practices which jeopardize the public health, safety, or interest." Section 1 (b).

**D. General terms should be interpreted so as not to lead to absurd results.**

1. General terms appearing in constitutions and statutes have been limited in their application so as to lead to no absurd results.

To construe Section 7 of the Federal Act as foreclosing the State of Wisconsin from enacting this law to prevent the interruption of vital public utility services

is to lead to an absurd result. One of the first and foremost canons for the interpretation or construction of words in a constitution or statute requires that the intention of the lawmakers must control and when general language is used and a literal interpretation thereof would result in absurd consequences, such general language is not to be given a literal interpretation. In *Jacobson v. Massachusetts*, 197 U.S. 643, 655, this Court set forth this familiar rule as follows:

“‘All laws,’ this court has said, ‘should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.’ *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *Lau Ow Bew v. United States*, 144 U.S. 47, 58, 36 L. Ed. 340, 344, 12 Sup. Ct. Rep. 517.”

In *Church of the Holy Trinity v. United States*, 143 U.S. 226, 228, this Court said:

“It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.”

In *United States v. American Trucking Association*, 310 U.S. 534, this Court declared as follows:

" \* \* \* Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of the words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " (p. 543)

It is inconceivable that Congress intended that a state should be powerless to adequately protect its citizens from the dire consequences that inevitably follow from a public utility strike. Did Congress by the passage of the Taft-Hartley Act intend to deny to the states and to confer upon the employees of a public utility the right to determine whether the people should have heat with which to warm their homes and cook their foods, power with which to pump water for domestic uses and for fire protection, power for the operation and use of factories, elevators, street lighting, street cars, trackless trolleys, signals for police and fire alarms, and for railroads and airports? Did Congress conclude that it would aid "the free flow of commerce" by so doing? If such be the fact it would appear that it is an idle boast to declare that under our system of government we have a dual form of sovereignty—"an indestructible Union composed of indestructible States."

The terms "collective bargaining" and "concerted activities" as used in Section 7 of the Taft-Hartley Act are

general in their nature. Congress did not give a definition of either term. It is a common rule of statutory construction that when a legislative body has used general terms in a statute the lawmakers must have intended that such general terms may be interpreted to limit the effect of the statute so that it will not produce unreasonable results—results that could not have been intended by the lawmakers.

The same result is applied to the interpretation of general words appearing in constitutional enactments. For example, the right of freedom of speech has been held not to be an absolute right even though the United States Constitution itself makes no qualification. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490; *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722; *Near v. Minnesota*, 283 U.S. 697; *Gitlow v. New York*, 268 U.S. 652.

In *Gitlow v. New York*, *supra*, this Court declared:

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. \* \* \* Reasonably limited, it was said by Story (Story on the Constitution, page 634), in the passage cited, this freedom is an *inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.*" (p. 666) (Emphasis supplied)

In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, this Court, in referring to the right of working men to organize for legitimate objects, stated:



"The cardinal error of the defendant's position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others." (p. 355).

Justice Holmes in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, declared as follows with respect to the limitations which the police powers of a state place upon fundamental rights:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side." (p. 355)

Nor is the liberty of contract an absolute right. *Munn v. Illinois*, 94 U.S. 113; *Frisbie v. United States*, 157 U.S. 161. In the *Frisbie* case it was held that:

"While it may be conceded that, generally speaking among the inalienable rights of the citizens is that of the liberty of contract, yet such liberty is not absolute and universal." (p. 165).

At an earlier date the Court in speaking of the "implied reservations" in constitutional and statutory enactments, declared:

"There are limitations on such power which grow out of the essential nature of all free governments.



Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." *Savings and Loan Assoc. v. Topeka*, 20 Wall. 655.

If general words in constitutional guaranties are subject to limitations and qualifications, certainly general words appearing in the Taft-Hartley Act are equally subject to limitations as a means of carrying out the intent and purpose that prompted the passage of the law.

#### E. Congress has made it clear that the right to strike is Limited.

An examination of the legislative history of Section 13 of the Taft-Hartley Act clearly shows that the right to strike as set forth in Section 7 is a qualified right. Section 13 of the Wagner Act, 29 U.S.C.A. § 163 provided:

"Nothing in sections 151-166 of this title shall be construed so as to interfere with or impede or diminish in any way the right to strike."

The Taft-Hartley Act amended Section 13 by adding the italicized words, so it now reads:

"Nothing in *this subchapter, except as specifically provided for herein*, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, *or to affect the limitation or qualification on that right.*" (Emphasis supplied).

The Report of the Committee of Conference includes the following statement with respect to the amendment of Section 13:

"Section 13 of the existing National Labor Relations Act provides that nothing in the act is to be construed so as to either interfere with or impede

or diminish in any way the right to strike. Under the House bill, in section 12(e), a provision was included to the effect that except as specifically provided in section 12 nothing in the act should be so construed. Under the Senate amendment, in section 13, section 13 of the existing law was rewritten so as to provide that except as specifically provided for in the act, nothing was to be construed so as either to interfere with or impede or diminish in any way the right to strike. The Senate amendment also added one other important provision to this section, providing that *nothing in the act was to affect the limitations or qualifications on the right to strike, thus recognizing that the right to strike is not an unlimited and unqualified right*. The conference agreement adopts the provisions of the Senate amendment. \* \* \* (Emphasis supplied) House Report No. 510, June 3, 1947, (U.S. Code Congressional Service, 80th Congress, First Session, 1947, pages 1165-1166)

We are not to be left to conjecture as to the interpretation to be given to Sections 7 and 13. This Court in the *Briggs & Stratton* case, (*International Union v. Wis. E. R. Board*, 336 U.S. 245), held that the Wisconsin board could order the union to cease and desist from instigating intermittent and unannounced work stoppages. In that case the labor union claimed that such activities constituted "concerted activities" as authorized by Section 7 of the Federal Act and the State Act prohibiting such activities was in conflict with the Federal Act. In the course of the opinion, Justice Jackson, speaking for the majority of the Court, in holding there was no such conflict, said:

" \* \* \* Unless we read into § 13 words which Congress omitted and a sense which Congress showed no intention of including, *all that this provision does is to declare a rule of interpretation for*

*the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. It did not purport to modify the body of law as to the legality of strikes as it then existed. This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike,' *Dorchy v. Kansas*, 272 U.S. 306, 311, 71 L. Ed. 248, 269, 47 S. Ct. 86."* (Emphasis supplied)

\* \* \* That Congress has concurred in the view that neither § 7 nor § 13 confers absolute right to engage in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the Courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike." (See full text of Committee Report at Note 15, 336 U.S. 245, 260)

This Conference Report of the Senate and House conferees which recommended the adoption of the Taft-Hartley Act, and the statements of Congressman Hartley, remove all vestige of doubt concerning the Congressional intention. Congressman Hartley specifically stated that the bill would not invalidate state laws concerning unfair labor practices, and the Conference Report in the portion relating to Section 7 of the Act states that the "concerted activities" authorized pertain only to lawful activities. The Conference Report prepared by the House and Senate conferees put the bill in its final form. The Report submitted by Mr. Hartley (Report No. 510) includes the following statements concerning Section 7 of the Taft-Hartley Act:

"Thus the courts have firmly established the rule, that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. (p. 1144)

\* \* \*

"By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act." (p. 1145)

The Report further stated that such "undesirable concerted activities are not to have any protection under the Act." (p. 1145)

On page 6540 of Volume 93 of the Congressional Record (Legislative History, p. 883) statements made by Congressman Hartley, a co-author of the bill, in response to an inquiry by Wisconsin's Congressman Kersten, are set forth as follows:

"Mr. Kersten of Wisconsin: \* \* \*

"I would like to ask the gentleman about that portion which pertains to the validity of state laws. We are very anxious that disputes be settled at the state level so far as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record, that that is the sense of the language and of the report?"

"Mr. Hartley:

"That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In

other words, this will not interfere with the validity of the laws within that State'."

The statements of Mr. Hartley clearly indicate that Congress was aware of the importance of permitting states to continue to exercise their traditional police powers concerning such labor practices as the states may regard as inimical to the public welfare.

While statements made on the floor of the Senate or the House by senators or representatives who were not in charge of a bill are without weight in the interpretation of a statute (*McCaughn vs. Hershey Chocolate Co.*, 283 U.S. 488), such statements when made by an author or sponsor of a bill are entitled to consideration in interpreting the meaning of the statute which results from the passage of the bill.

In *Wright vs. Mountain Trust Bank*, 300 U.S. 440, the Court stated:

"Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure."

From the foregoing it is clear that the right to engage in concerted activities for the purpose of collective bargaining (Section 7) is not an absolute right. Congress did not intend to foreclose the states from exercising their police powers to safeguard the public health and safety. The Wisconsin act thus does not conflict with the Federal act, but goes beyond the scope of the latter and covers a field intended by Congress to be left to the states.



**F. The "Intention of Congress to Exclude States from Exerting their Police Powers Must be Clearly Manifested."**

In the field of labor relations it is a well established principle that an intention of Congress to exclude states from exerting their police power must be clearly manifested. *Allen-Bradley Local v. Wisconsin E. R. Board*, 315 U.S. 740; *International Union v. Wis. E. R. Board*, 336 U.S. 245; *Algoma P. & V. Co. v. Wisconsin E. R. Board*, 336 U.S. 315.

In *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, the Court had under consideration a Wisconsin statute which declared it to be an unfair labor practice for employes to intimidate or coerce other employes by mass picketing and similar acts. The union contended that its members' acts constituted "concerted activities" within the meaning of Section 7 of the Wagner Act and by reason thereof the statute of the state which prohibited such activities was in conflict with the federal laws. The Court declared:

"We agree with the statement of the United States as amicus curiae that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports on the federal Act plainly indicate that it is not 'a mere police court measure' and that authority of the several States may be exerted to control such conduct. Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.'"

\* \* \*

"We will not lightly infer that Congress by the mere passage of a federal Act has impaired the



*traditional sovereignty of the several States in that regard.*" (p. 748) (Emphasis supplied)

The Court's decision in the foregoing case was rendered in 1942. The Taft-Hartley Act was adopted in 1947. The language of Section 7 of the Wagner Act concerning the right of employees "to engage in concerted activities" is the same as appears in Section 7 of the Wagner Act. When Congress used this language in its 1947 enactment it incorporated by reference the judicial interpretation which that language had received as a part of the Wagner Act. In other words, the judicial interpretation as set forth in the Court's opinion in the *Allen-Bradley* case (315 U.S. 740) is now deemed to be incorporated into Section 7 of the Taft-Hartley Act.

In *Hecht vs. Malley*, 265 U.S. 144, the Court stated the general rule as follows:

"In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment." (p. 153)

This Court in *International Union v. Wisconsin E. R. Board, supra*, (Briggs & Stratton case) in considering a contention that the Wisconsin Employment Peace Act was in conflict with the Taft-Hartley Act, reiterated the principle that it had announced in the *Allen-Bradley* case:

" \* \* \* However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.' *Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Bd.*, 315 U.S. 740,

749, 750, 86 L.Ed. 1154, 1164, 1165, 62 S.Ct. 820. We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case." (p. 253)

\* \* \*

In *Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd.*, 336 U.S. 301, this Court said that

" \* \* \* it is not even necessary to invoke the principle that in cases of concurrent power over commerce State law remains effective so long as Congress has not manifested an unambiguous purpose that it should be supplanted. \* \* \* "

We search in vain for any clear manifestation that Congress has excluded the state police powers in cases such as these. Petitioner seems to contend that because there is no express provision in the Federal Act *reserving* to the states the right to exercise their police powers in cases such as this, Congress intended that the states were forbidden from exercising such powers. To the contrary, the burden is on petitioner to show an express declaration that the state powers were to be excluded. This it has failed to do.

Did Congress in the enactment of the Taft-Hartley Act intend to deny states the right to exercise their police powers? Was that statute intended to serve as a limitation upon the powers of the states or was it merely intended to serve as a limitation on the power of private persons—employer and employes? The presumption should be that Congress did not intend to deprive a sovereign power of its authority over its citizens. *United States v. United Mine Workers of America*, 330 U.S. 258; *United States v. Herron*, 20 Wall. 251; *Texas v. White*, 7 Wall. 700. See the quotations from these cases appearing at pages 23 and 25 of this brief.

To assume that Congress by the enactment of the Taft-Hartley Act intended that a state should not have the right to protect itself by enacting laws which are designed to secure the essential services of its public utilities is to assume that Congress was indifferent to the safety, health and comfort of all of the citizens of the various states.

G. Congress has prohibited Federal employes from striking in order to prevent the interruption of vital Federal services.

1. It was not necessary to grant similar powers to the states as they already possessed such powers under the Tenth Amendment.

Congress through the enactment of Section 305 of the Taft-Hartley Act made it unlawful for Federal employes or employes of wholly owned government corporations, to go on strike. 61 Stat. 160, 29 U.S.C.A. § 188. Section 305 provides as follows:

"It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strikes. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for re-employment for three years by the United States or any such agency."

Under this statute the employes of the TVA or any other federal power project are prohibited from striking. Yet petitioner in effect contends that the State of Wisconsin cannot prohibit the employes of the electric power company in Milwaukee from striking.

Congress undoubtedly felt that in order to prevent any interruption of the vital service rendered by the Federal

Government and its agencies, it was necessary to prohibit strikes by Federal employees. Can it therefore be reasonably argued that by recognizing in Section 7 the right of employees to engage in "concerted activities," Congress intended to deprive the states from enacting similar measures to assure the continuity of vital services within their boundaries? When we consider that the states already possessed such power under the Tenth Amendment, it is apparent that it was not necessary that Congress grant such power to the states. To interpret the Act otherwise would be to say that Congress intended to discriminate against the states in favor of the Federal government.

**H. Congress has provided for injunctions against strikes which would imperil the national health and safety.**

1. It was left to the states to take similar measures to cope with emergencies affecting the health and safety of their citizens.

The "public utility anti-strike" law of New Jersey was held not to be in conflict with the Taft-Hartley Act in *In re New Jersey Bell Telephone Co.*, 26 LRRM 2585 (N.J. Sup. Ct., October 2, 1950). In this case it was the union who was seeking to uphold the statute and the company was attacking it. The court pointed out that Sections 206-210 of the Taft-Hartley Act provide for the enjoining of strikes which would imperil the national health or safety. 61 Stat. 154, 29 U.S.C.A. §§ 176-180. Were the states foreclosed from enacting similar measures to cope with local emergencies? In upholding the state statute, the court said:

" \* \* \* Our examination of the Federal Act discloses no provision therein which prohibits a state,

in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested,' *Alleff-Bradley Local vs. Wisconsin Employment Relations Board*, 315 U.S. 740, \* \* \* we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been pre-empted by Congress, and that the *O'Brien* case, *supra*, is inapplicable to the present situation."

As above pointed out Congress sought only to legislate with respect to emergencies imperiling the *national* health and safety. Certainly it was not the intent of Congress by so legislating to foreclose the states from taking measures to prevent emergencies confined within its own borders. Obviously Congress recognized that this was a field for state legislation.

It would not have been feasible for Congress to legislate with respect to local emergencies. Certainly it was



not the intent of Congress by so legislating with respect to national emergencies to foreclose the states from taking measures to prevent emergencies confined within their own borders. Obviously Congress recognized that local emergencies could be more feasibly coped with from the state level. Congress wisely left this field for state legislation.

Petitioner contends that the failure of Congress to approve fully those provisions of H.R. 3020 which dealt with "Strikes Imperiling Public Health and Safety", by eliminating the terms "public utilities" and "public health, safety or interest", and limiting the application of Sections 206-210 to strikes affecting an "entire industry or substantial part thereof" which would "imperil the national health", is indicative that states were to be excluded from legislating with respect to emergencies arising in public utility industries. On the contrary, it is indicative that Congress wanted the Federal Government to intervene in emergencies only of a national scale. The states already possessed the power to cope with emergencies at the local level. Congress did not want the Federal Government to occupy this field.

Petitioner makes the same contention with respect to the rejection of the five identical bills (H.R. 14, 34, 68, 75, 76). The purpose of the bills was to leave the handling of local emergencies to the state and local governments. Doubtless the bills were defeated because the states already possessed such powers. No Congressional enactment was required for this purpose. These bills also provided that when the President found that a public emergency existed and the local government facilities had failed, he could issue an order forbidding a work stoppage. A compulsory arbitration procedure was provided for; the President to appoint the panel members.



Extension of Remarks of Rep. Case, 93<sup>rd</sup> Cong. Rec. A-1007-8.

The rejection of these bills cannot be said to evidence an express intention that states were to be excluded from coping with emergencies arising out of public utility labor disputes. Again it is indicative only of the Congressional intent to limit as much as possible any intervention by the Federal Government into labor disputes. If such bills were passed, Congress obviously reasoned that the Federal Government would be intervening in many local labor disputes. That Congress intended that the Federal Government should intervene only in the event of a national emergency is borne out by the majority Report of the Senate Committee, (S. Rep. 105, 80th Cong., 1st Sess., p. 14) :

"While the committee is of the opinion that in most labor disputes the role of the Federal Government should be limited to mediation, we realize that the repercussions from stoppages in certain industries are occasionally so grave that the national health and safety is imperiled. An example is the recent coal strike in which defiance of the President by the United Mine Workers Union compelled the Attorney General to resort to injunctive relief in the courts. The committee believes that only in national emergencies of this character should the Federal Government be armed with such power. But it also feels that this power should be available if the need arises."

It seems absurd to say that because Congress wanted to limit intervention by the Federal Government to cases of national emergencies caused by strikes in entire industries, that this was an express declaration that states were to be foreclosed from coping with local emergencies arising out of public utility labor disputes. The states

have always had this power. Where then is the clear manifestation in the Federal Act that the states were deprived of such powers? See *Allen-Bradley Local v. Wisconsin E. R. Board*, 315 U.S. 740; *International Union v. Wisconsin E. R. Board*, 336 U.S. 245.

On the contrary, we find an express declaration in the Federal Act that the Federal Mediation and Conciliation Service was not to be used where the labor dispute was local in nature and state facilities were available. Section 203(a) provides in part:

"The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if the State or other conciliation services are available to the parties."

Thus it is clear that Congress intended that the states would mediate such labor disputes as the one involved in the case at bar. And when such a labor dispute imminently threatens to cause a state of emergency, it is equally clear that the "National Emergency" sections (206-210) would not be applicable. As heretofore pointed out, this section is to be used only in case of a strike in an *entire* industry which imperils the *national* health or safety. In view of the foregoing, how can it be reasonably contended that Congress intended that the states be foreclosed from enacting legislation such as the Wisconsin law here involved?

Section 7 of the Taft-Hartley Act contains the same language as did Section 7 of the Wagner Act. As the Wagner Act was interpreted, the right to engage in "concerted activities" was not absolute, notwithstanding the general language of the statute, e.g., *Allen-Bradley Local v. Wisconsin E. R. Board*, 315 U.S. 750. In enacting the Taft-Hartley Act, the conferees

expressly stated that they purposely avoided enumerating the qualifications because they were fearful that any specific enumeration might have a limiting effect and thus make certain conduct not enumerated subject to the protection of the Act. H. Rep. No. 510.

The same can be said for not adopting the provision of Representative Hartley's bill or the five other bills above mentioned. Recognizing that under the interpretation of the Wagner Act, the states were not excluded from exercising their police powers to cope with matters of local concern, Congress apparently felt that any attempt on their part to specifically set forth provisions dealing with emergencies arising at the local level would have a limiting effect, because any situations not enumerated would possibly be interpreted as not intended to be included.

# I. The O'Brien case is not applicable to the present issues.

1. A public utility strike is not a traditional, peaceful strike.

Petitioner contends that *International Union v. O'Brien*, 94 L.ed. 659, (October Term, 1949), is completely determinative of the issue. The Michigan statute involved in that case was a general labor relations law and applied to *all* employes and employers generally. The Michigan act required a majority vote of all of the members of the bargaining unit before a strike could be called, whereas the Taft-Hartley Act has no such requirement. Thus, under the Michigan law, no group of employes in *any* industry or business within the state, regardless of whether it affected interstate commerce or not, could strike unless such majority vote was first obtained.

The Wisconsin statute, on the other hand, is narrowly confined to a single industry, and only applies under certain circumstances. The act only prohibits those strikes which would "cause an interruption of an essential service." Thus the act does not flatly prohibit *all* strikes in public utilities. If the service could continue to be furnished, notwithstanding a strike among some of the employes, such a strike would not be within the prohibition of the act.

It is of the utmost importance to bear in mind the distinction between a broad, all-inclusive statute and a narrow statute which is confined to a concrete situation. *Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U.S. 287, 297; *Thornhill v. Alabama*, 310 U.S. 88; *Carlson v. California*, 310 U.S. 106. See also *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490. In these cases it was recognized that, notwithstanding the general constitutional grants of freedom of speech, press, and peaceful assemblage, a state could restrict the exercise of such rights to preserve the peace and protect its citizens, if the restriction was narrowly confined and was not broad and sweeping in its application.

" \* \* \* 'We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger \* \* \* as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.' 310 U.S. 105, 84 L.ed. 1104, 60 S.Ct. 736. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it

were an abstract prohibition of all picketing wholly unrelated to the violence involved." (Milk Wagon Drivers U. v. Meadowmoor Dairies, 312 U.S. 287, 297.)

Are the general rights recognized under Section 7 of the Federal Act to be accorded any greater sanctity than our constitutional rights? Clearly then, the State of Wisconsin can enact a narrowly confined statute to protect the public from the calamitous consequences of an interruption of a vital public utility service. The statute could not be more narrowly drawn. The legislature expressly found that the interruption of public utility service (as defined in the Act) results in damage and injury to the public and creates an emergency. (Section 111.50).

When we consider that the requirement of this Michigan act, with respect to a majority vote being a condition precedent to a strike, applies to *all* employers and employes, and further consider that the Taft-Hartley Act has no such requirement, it is not difficult to see why this Court in the *O'Brien* case held such a sweeping piece of legislation to be in direct and irreconcilable conflict with the federal law.

This Court in the *O'Brien* case said that *International Union v. Wisconsin E. R. Board* was not controlling because that case "was not concerned with a traditional, peaceful strike." It is submitted that a strike in a public utility industry is similarly not "a traditional, peaceful strike." True, there may be no violence whatsoever on the part of the striking workers, but the inevitable results of a public utility strike are of such a grave consequence, in fact they give rise to a state of emergency, that it cannot be said such strikes are of the traditional, peaceful nature. The traditional, peaceful strike in private industry affects only those immediately concerned, and then,



only in a *pecuniary* sense. On the other hand, a public utility strike, even though carried on in the most peaceful manner, affects the *entire community*, and not in a pecuniary sense, but it puts the *health and safety* of the community in grave peril. This Court in the *O'Brien* case, applying the principles laid down in the *International Union* case and the *Allen-Bradley* case, has made it clear that where the strike involved is not of a "traditional, peaceful" nature, the states are free to exercise their police powers. In cases of such strikes Congress has not preempted the field, but has left to the states the exercise of their traditional police powers. Justice Murphy in a dissenting opinion in the *International Union* case said:

" \* \* \* We have recognized that the phrase 'concerted activities' does not make every union activity a federal right. We have held that violence by strikers is not protected, *Allen-Bradley Local, U.E.R. M.W. v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 86 L.Ed. 1154, 62 S.Ct. 820; that a sit-down strike, *National Labor Relations Bd. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 83 L.Ed. 627, 59 S.Ct. 490, 123 A.L.R. 599, a mutiny, *Southern S.S. Co. v. National Labor Relations Bd.*, 316 U.S. 31, 86 L.Ed. 1246, 62 S.Ct. 886, and a strike in violation of a contract, *National Labor Relations Bd. v. Sands Mfg. Co.*, 306 U.S. 332, 83 L.Ed. 682, 59 S.Ct. 508, must be withdrawn from the literal language of §7. \* \* \* " (336 U.S. 245, 269)

The *O'Brien* case was held not to be applicable by the New Jersey Supreme Court to New Jersey's "public utility anti-strike" law. In *re New Jersey Bell Tel. Co.*, 26 L.R.R.M. 2585, (October 2, 1950). A substantial portion of the court's opinion is quoted at page 43 of this brief. The court held the *O'Brien* case was not applicable because it involved a peaceful strike in a *private* industrial organization engaged in interstate commerce.



Referring to the fact that the New Jersey statute applied only to public utilities whose services are primarily interstate, the court said:

"It is significant that in the *O'Brien* case, *supra*, the court said: 'Even if some legislation in this area could be sustained, the particular statute before us could not stand.'"

The New Jersey court further concluded that inasmuch as Congress had made provisions for the Federal Government to enjoin strikes which would create national emergencies, and had not expressly forbidden the states to take similar measures to cope with more localized emergencies, the right of the states to prohibit strikes and lockouts in this sphere had not been preempted by Congress.

The Wisconsin Court adopted the reasoning of the New Jersey Court in the recent case of *Wisconsin E. R. Board vs Milwaukee Gas Light Co.*, 44 N.W. 2d 547 (Nov. 8, 1950).

**J. Compulsory arbitration is a substitute for the right to strike.**

1. It is the only feasible way to break an impasse and at the same time assure the constant rendition of vital public utility services.

Petitioner asserts that the compulsory arbitration feature of the Wisconsin act conflicts with the right of employees to "bargain collectively" as set forth in Section 7 of the Federal Act. If, as we contend, a state may prohibit the right to strike when such a strike would interrupt an essential public utility service, it logically follows that the state can provide for compulsory arbitration as a substitute for the right to strike.

It should be noted that the right of public utility employees to strike has not been flatly denied by Wisconsin. Wisconsin has only denied the right to strike when such strike would "cause an interruption of an essential service". Section 111.62, Wis. Stats. Thus one group of employees in a public utility could conceivably go out on strike and not cause an interruption of an essential service. The Wisconsin law does not apply to such a situation.

Furthermore the compulsory arbitration features of the Wisconsin law do not destroy good faith collective bargaining, as petitioner asserts. On the contrary, we submit that it creates an additional incentive to bargain in good faith because unless both parties can come to an agreement by voluntary negotiation, the matter will be taken out of their hands entirely and be determined by the state through a statutory tribunal.

Under the Wisconsin law compulsory arbitration is only the last resort when all else has failed. The Wisconsin law does not even apply until the collective bargaining process has reached "an impasse and stalemate." Section 111.54, Wis. Stats. Then it requires a petition from either party to set the machinery of the law in motion. The next step is the appointment of a conciliator who is required to "exert every reasonable effort to effect a prompt settlement of the dispute." Section 111.54, Wis. Stats. Only after the conciliator has failed to effect a settlement does the arbitration provision come into play. Of course, the parties are free to negotiate a settlement between themselves even pending the decision of the arbitrators. Section 111.56, Wis. Stats. And the arbitration order itself can be changed by the agreement of the parties. Section 111.59, Wis. Stats.

Because Wisconsin has determined that strikes in public utilities are against the public policy of the state, it had to select a substitute for this coercive method of collective bargaining. Certainly the selection of compulsory arbitration, to come into play only when collective bargaining and conciliation have reached an impasse, was a reasonable one. It is the only feasible way to break an impasse, and at the same time assure the constant rendition of the vital public utility service. If the state through its police powers can prohibit strikes which threaten to interrupt essential public utility services, it only logically follows that it may provide for compulsory arbitration as an alternative.

2. The statements of Senator Taft are not persuasive to petitioner's position.

The statements of Senator Taft which petitioner has quoted in its brief are not persuasive to petitioner's position. They only go to show that Congress did not want to provide for compulsory arbitration on a nation-wide scale. By not adopting compulsory arbitration for *all* industries, does it necessarily follow that Congress intended that a state was foreclosed from providing for it in a single industry—one in which it was against the public policy of the state to permit strikes? Clearly Congress had no such intention. We are not dealing here with a competitive industry operated as a free enterprise, but with a public utility industry which has for years been closely regulated by the state.

It is submitted that merely because Congress refused to consider compulsory arbitration on a national scale, that is by no means an indication that Congress intended that states were powerless to adopt such a measure to prevent the interruption of essential public utility services within their borders.

3. The Wisconsin board does not have to find that the parties have bargained in good faith before it can appoint a conciliator.

Petitioner states at page 35 of its brief that under the Wisconsin Act the state board, before invoking the arbitration procedure, must first make a determination that the parties have bargained in good faith. Petitioner then argues that this conflicts with the superior jurisdiction of the National Board to make such determination. On the contrary, under the Wisconsin law the board only has to make a finding that the collective bargaining process has reached an impasse and stalemate, notwithstanding good faith efforts on the part of both parties, and that such dispute will cause an interruption of an essential service. Section 111.54 provides in part:

“ \* \* \* Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, *notwithstanding good faith efforts on the part of both sides to such dispute*, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. \* \* \* ”

Obviously the phrase “notwithstanding good faith efforts” does not mean the board must find that the parties have bargained in good faith. Paraphrased, it means that if the board finds that an impasse has been reached, *even though* there have been good faith efforts, it shall appoint a conciliator.

4. Employees are not precluded from attaining in compulsory arbitration what they might otherwise attain in collective bargaining.

At page 36 of its brief, petitioner asserts that by virtue of Section 111.58, the state has removed from the juris-

diction of the arbitrators, those matters over which the employer and union must bargain collectively. Section 111.53 provides:

"The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union."

Petitioner has given this section a very broad and liberal interpretation. Obviously the legislature did not intend to remove from the jurisdiction of the arbitration those matters, such as wages, hours, and conditions of employment, which are universally regarded as proper subjects for collective bargaining. If such was the intention, the entire act would be meaningless. Clearly the legislature intended only to prohibit the arbitrators from passing on those subjects which are not usually regarded as proper subjects for collective bargaining.

**5. There is no interference with the Federal mediation service.**

At page 37 of its brief, petitioner contends that the Wisconsin law interferes with the mediation features of the Federal Act (Sections 203-205). The Federal Act expressly directs that the federal mediation service shall not be invoked where the labor disputes are local in nature, having only a minor effect upon interstate commerce, and state or other conciliation service is available. Sec. 203(b). In view of this it seems inconceivable that any conflict would arise. The fact that the federal service was invoked in this particular labor dispute is immaterial. Under the provisions of Section 203(b), it never should have been invoked.



**K. A public utility employer has no bargaining power to meet the threat of a strike.**

Petitioner contends that the prohibition of the right to strike does violence to the entire concept of collective bargaining, which is the process by which employes, through self-organization, are able to deal on terms approaching equality with the employer for the aggregate of the employes' services because of the employes' legal right and actual ability to quit work in concert. Petitioner fails to appreciate that in the public utility industry, if the employes were allowed to strike, the employer has no bargaining power. If a strike were to interrupt the service of an electric utility in a large metropolitan center, the employer would doubtless have to accede to the union demands in less than 24 hours. The interruption of the service would so vitally affect every inhabitant of the community, and the ensuing public pressure would be so great, that the employer would have no choice but to capitulate immediately. Unlike a private employer, a public utility employer cannot close his plant. He must render his services without fail every day of the year, and every hour of the day. A public utility employer has little, if any, bargaining power after its employes have gone on strike.

**L. Every public utility employe has agreed not to strike by voluntarily continuing his employment in light of the statute.**

Under well recognized rules of construction the pertinent laws of a state where a contract is made are deemed to be embodied and form a part of the contract. That is especially true when the contract is to be performed in such state.



That statute must therefore be interpreted in the same manner as though it expressly required every public utility employer and his employees to agree, as one of the conditions of the employment contract, that there would be neither a lockout nor a strike and that all disputes would be submitted to arbitration.

Obviously, under the statute, the employee is not compelled to enter into such a contract. However, by voluntarily continuing his employment in such business he must be deemed to have voluntarily agreed to such method of fixing wages and working conditions. The employer does not have the same option. The law requires him to continue to render services to the public.

If an employee of a public utility entered into a written contract containing provisions comparable to those set forth in Chapter 414, Wisconsin Laws of 1947, it would be illegal for such employee to strike.

In *National Labor Relations Board v. Sands Mfg. Co.*, 306 U.S. 332, it was held that "concerted activities," consisting of a strike in violation of the terms of a contract, must be deemed to "be withdrawn from the literal language of Section 7."

## III.

# THE WISCONSIN LAW DOES NOT VIOLATE THE DUE PROCESS OR EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

A. When a statute is challenged as being violative of the due process or equal protection clauses, there arises a presumption of constitutionality.

1. Petitioner has not shown that the legislature was acting clearly unreasonably and arbitrarily.

When a statute is challenged as being unconstitutional, because it is violative of due process or denies the equal protection of the laws, there arises a presumption of constitutionality. *Powell v. Pennsylvania*, 127 U.S. 678. "It is a presumption of fact, of the existence of factual conditions supporting the legislation." *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209. Thus the burden is on the challenger to show that such a state of facts exists as renders the action of the legislature clearly unreasonable or arbitrary. *O'Gorman & Young v. Hartford F. Ins. Co.*, 282 U.S. 231. Thus the petitioner must show that the effects of a strike by public utility employees are such that the legislature's enactment of Chapter 414, Wisconsin Laws of 1947, was clearly unreasonable and arbitrary. In other words, in order for this Court to declare the statute unconstitutional as being violative of the Fourteenth Amendment, petitioner must show that public health and safety would be so minutely affected by a public utility strike that the legislature was acting clearly unreasonably and arbitrarily in providing for compulsory arbitration and in prohibiting strikes. At page 17 some of the calamitous consequences of a public utility strike are pointed out. It is obvious that petitioner cannot meet the test.

Petitioner argues that the Wisconsin law is not confined to situations of actual public danger and peril. It is difficult to conceive of an interruption of an "essential service", as defined by the statute, which would not place the public in great danger and peril. Does petitioner mean to contravene the express finding of the legislature that


"\* \* \* The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and *creates an emergency* justifying action which adequately protects the general welfare."? Section 111.50 (Emphasis supplied)

Mere opinions of counsel certainly cannot overcome a finding of a legislature, which body is presumed to have investigated the facts with respect to which it promulgates its legislation. The burden is upon petitioner to show that the actual facts are such as to render the action of the legislature clearly unreasonable and arbitrary. *O'Gorman & Young v. Hartford F. Ins. Co.*, 282 U.S. 251. It must meet this burden by introducing evidentiary facts. Obviously mere statements of counsel cannot be considered.

In *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722, the Court said:

"\* \* \* The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. \* \* \*"  
(p. 725)

With respect to the duty of courts in passing upon the issue of due process, this Court in *Nebbia v. New York*, 291 U.S. 502, declared:

“ If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.

“With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. \* \* \*

(p. 537)

Many years ago Edmund Burke, the illustrious friend of the American Colonists, declared:

“Liberty, to be enjoyed, must be limited by law, for law ends where tyranny begins, and the tyranny is the same, be it the tyranny of a monarch, or of a multitude—nay, the tyranny of the multitude may be the greater, since it is multiplied tyranny.”

The late Justice Brandeis, one of organized labor's greatest defenders, recognized that as a means of protecting the public a state “may substitute processes of justice for the more primitive method of trial by combat.” In a celebrated dissenting opinion in *Duplex Printing Press v. Deering*, 254 U.S. 443, he announced:

“All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense; *may substitute processes of justice for the more*

*primitive method of trial by combat.*" (p. 448) (Emphasis supplied)

Petitioner in the case at bar disagrees with the Brandeis philosophy. It appears to cherish "the more primitive method of trial by combat."

In *New State Ice Co. v. Liebmann*, 285 U.S. 262, the same learned jurist, in a dissenting opinion, declared:

"It is settled that the police power commonly invoked in aid of health, safety and morals extends equally to the promotion of the public welfare. (p. 304)

\* \* \*

"There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.

\* \* \*

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." (p. 311)

In *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, it was recognized that "powerful labor unions have been organized" with "multitude of members," and, as a result thereof they have "acquired a vast power in the presence of which the individual may be helpless." That statement was never more true than it is today when the employes of a public utility elect to strike.

Petitioner contends that public utility employes have a constitutional right to inflict such injuries upon the public as are necessarily incident to a strike by such employes. In short, it is their position that the State of Wisconsin is powerless to enact a valid statute prohibiting them from inflicting such injuries. We submit that the State of Wisconsin has such power.



In commenting upon the absence of any constitutional right to strike, this Court in *International Union v. Wisconsin E. R. Board*, 336 U.S. 245, declared:

"This Court less than a decade earlier has stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law nor the Fourteenth Amendment, confers the absolute right to strike.' *Dorchy v. Kansas*, 272 U.S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. *Duplex Co. v. Deering*, 254 U.S. 443, 488. This Court had adhered to that view. *Thornhill v. Alabama*, 310 U.S. 88, 103 (6 L.R.R. Man. 697). The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining \* \* \*".

**B. A legislature clearly has the power to prescribe wages, hours, and working conditions in the public utility industry.**

Petitioner contends that the Wisconsin law is in violation of the Due Process Clause of the Fourteenth Amendment because it is in essence an attempt by the legislature to establish wages, hours, and working conditions of the public utility employees. Petitioner relies on *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522. The state law there in question applied broadly to a great variety of private industries. The plaintiff was a meat packing company. Because of its broad coverage the act was held invalid. However, in *Wilson v. New*, 243 U.S. 332, it was held that such a law was proper when it applied only to a public utility.



To contend that a legislature is powerless to establish wages, hours, and working conditions seems wholly without merit in view of the more recent decisions of this Court in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379; *United States v. Darby*, 312 U.S. 100; *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177; and *Lincoln Union v. Northwest Co.*, 335 U.S. 525. To contend that a legislature is powerless to establish wages, hours, and working conditions is to say that Congress was acting beyond its power when it enacted the Fair Labor Standards Act. 52 Stat. 1060, 29 U.S.C.A. §§201-219. The Act was held valid in *United States v. Darby*, 312 U.S. 100. To follow the logic of petitioner's contention would be to say that states are powerless to regulate public utilities. Does petitioner mean to contend that a state does not have the power to prescribe the wages, hours, and working conditions in public utilities? Is it petitioner's contention that the state's power extends no further than to establish rates of service? If so, clearly such contention is without merit. If a state can prescribe working conditions in private industry, (*West Coast Hotel Co. v. Parrish*) it certainly can prescribe them for the public utility industry, which virtually serves as an agent of the state.

The philosophy of the *Wolff* case upon which petitioner relies has long since been rejected. This Court in *Lincoln Union v. Northwest Co.*, *supra*, said:

" \* \* \* That the due process clause does not ban legislative power to fix prices, wages and hours as was assumed in the *Wolff* Case, was settled as to price fixing in the *Nebbia* and *Olsen* Cases. That wages and hours can be fixed by law is no longer doubted since *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L.ed. 703, 57 S.Ct. 578, 108 A.L.R. 1330; *United States v. Darby*, 312 U.S. 100, 125, 85 L.ed 609, 623, 61 S.Ct. 451, 132 A.L.R. 1430; *Phelps Dodge Corp.*

v. National Labor Relations Bd., 313 U.S. 177, 187, 85 L.ed. 1271, 1279, 61 S.Ct. 845, 133 A.L.R. 1217.

"This Court beginning at least as early as 1934, when the *Nebbia* Case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principal that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

\* \* \*

"Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." (pp. 536-537)

The very fact that petitioner bases its contention upon the *Wolff* decision is indicative of its lack of merit. The principles of the *Wolff* case are no longer a part of our law.

C. To say that a state cannot prohibit strikes which vitally affect the public health and safety is to say that a state is powerless to change its methods of administering justice.

To declare that under the "due process" clause of the Fourteenth Amendment the state is powerless to prohibit strikes in businesses which vitally affect the public interest is equivalent to a declaration that a state has no power to change its methods of administering justice.

To hold that the right to strike in such employment is essential to "due process of law" would be "to deny every

quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." *Hurtado v. California*, 110 U.S. 232. In the above case the Court, in approving a new statutory criminal procedure adopted in California, declared:

"It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

"This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.

\* \* \*

"There is nothing in *Magna Charta* rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.

\* \* \*

"In the 14th Amendment, by parity of reason, it (due process of law) refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our

civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. 'The 14th Amendment' as was said by *Mr. Justice Bradley* in *Mo. v. Lewis supra*, 'does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding'." (pp. 237-8)

- D. The Wisconsin Act is clear in its terms and its application can be easily understood by reasonable persons.

Petitioner contends that the Wisconsin law violates the Due Process Clause because it is indefinite and vague and requires Workingmen to speculate as to what acts it applies. Petitioner asserts more particularly that the workingmen must speculate whether a proposed strike would cause an "interruption of an essential service." Certainly any reasonable person could ascertain whether a proposed strike would cause such an interruption. The statute expressly defines "essential service" to mean "furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state." Section 111.51(2). It does not take much imagination to ascertain whether a strike would interrupt one or more of such services. The legislature could not have selected any clearer terminology.

## IV.

**THE WISCONSIN LAW IS NOT IN VIOLATION  
OF THE THIRTEENTH AMENDMENT**

- A. An individual employe is free to quit his employment at any time.**

Petitioner's contention that the Wisconsin law violates the Thirteenth Amendment is answered by the express provisions of the law itself. Section 111.64 provides:

"Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

"All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter."

Under the foregoing statute the employe is free to terminate his employment at any moment that he may desire, so long as it is not done pursuant to an agreement with other employes which has as its object the coercion of an employer in respect to a labor dispute. While the literal words of the statute would appear to prohibit all quitting of labor or service which is "done in concert,"



other provisions of the Act—Section 111.50—make it abundantly clear that the legislature did not intend that a quitting in concert, which is not done for the purpose of enforcing a labor demand, should be deemed a violation of the statute. If two or more employees should agree to quit work at the same time for the purpose of attending college or for any other purpose not associated with a labor demand they certainly would not be in violation of the statute.

Involuntary servitude is no more imposed by the legislature through this enactment than it is imposed by the majority of the employees when such employees authorize their union to enter into a contract with an employer under which it is agreed that all employees will refrain from striking, and will resolve their labor disputes by arbitration.

The minority of the employees who may be opposed to arbitration and to a no-strike contractual undertaking, are in no different position than the petitioner in the case at bar. If Chapter 414 imposes involuntary servitude, it must also follow that such union contracts impose involuntary servitude upon the non-assenting minority. Needless to say, there is no involuntary servitude involved in either circumstance. If a state is guilty of inflicting involuntary servitude when it denies public utility employees the right to strike, the federal government must be deemed guilty of the same offense when it denies to its own employees the right to strike. See Section 305 of the Taft-Hartley Act.

New Jersey has a comparable statute requiring compulsory arbitration of labor disputes in public utilities. In *Van Riper v. Traffic Tel. Workers Fed of N. J.*, 61 Atl. 2d 570 (N.J. Ch.), reversed in 61 Atl. 2d 616, on



other grounds, the court answered the contention that the state law imposed involuntary servitude, as follows:

"What preserves the employee's liberty under the constitution is not collective bargaining but is the right of the individual to refuse to work for the Telephone Company \* \* \*

"The rights secured by the Constitution are secured to individuals and not to classes. The Union is the collective bargaining agent of the 12,000 employees of the Company, under appointment by a majority of the employees in the bargaining unit. In the ordinary course, a committee of the Union agrees with the Company on wages and, I suppose, this agreement is ratified by a majority of the Union members. But in any group so large as this, there must be many who do not want the Union to be their bargaining agent and many others who, while willing to be so represented, are dissatisfied with the stipulated wage scale. The constitutional rights of such individuals are as precious as the rights of the majority. If the argument of the Union were sound, then this minority would be condemned to involuntary servitude when wages were fixed by the collective bargaining process. But I say again, their constitutional right is preserved because they can surrender their employment."

### CONCLUSION

Can it be reasonably said the Congress, by the enactment of the Taft-Hartley Act, meant to prevent states from settling labor disputes in public utilities in an orderly manner so as to assure the safety and health of their inhabitants? Or did Congress intend that labor disputes vitally affecting the public interest be settled by "the more primitive method of trial by combat", to use the words of Justice Brandeis in *Duplex Printing Press v.*

*Deering*, 254 U.S. 443? Is a state to be prohibited from substituting for the right to strike more orderly and just processes for the settlement of labor disputes involving persons rendering essential services to the community? Is a state to stand still and be foreclosed from adopting new processes to adjust itself to the increasing changes and complexities of our swiftly growing social and economic world?

It is a matter of paramount importance that the essential services of public utilities flow constantly and uninterrupted to the consuming public. A state owes an obligation to its citizens to take every step necessary to assure the constant rendition of such services. The Wisconsin legislature acted very reasonably in substituting the arbitration process to settle public utility labor disputes in place of the conventional method of trial by combat. What more reasonable substitute could have been selected? What then is the nature of the petitioner's complaint?

There appears to inhere in the contentions of the petitioner the erroneous assumption that the arbitration board will not decide the issues in a fair and just manner; that notwithstanding such arbitrators are required to take an oath to faithfully perform their duties, they will, as a matter of fact, act in a dishonest and corrupt manner. The truth of the matter is that petitioner does not wish to present its demands involving public utilities to an impartial and unbiased public tribunal which has been established as an arm of the state. It seeks to achieve its demands by coercion. It does not want an equality of bargaining power.

Petitioner proceeds upon the well founded assumption that if it denies or threatens to deny to the public the

actual necessities of life, the public will exert such pressure upon the employer as to compel the employer to accede to the union's demands.

Petitioner's complaints are ill-founded. The arbitration board, which is called upon to make a determination if all else fails, is an agency of the State. The Act provides in part as follows with respect to the arbitrators and conciliators:

“ \* \* \* Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. \* \* \* ” Sec. 111.53.

What more assurance could the legislature give than that the arbitration board was to be an impartial, qualified agency? The legislature did its utmost to assure both employers and employees that they would be accorded a fair and just determination.

It must be conceded that a state can prescribe the wages, hours, and working conditions of a public utility. In enacting Chapter 414, Laws of 1947, the Wisconsin legislation in effect said: we will leave the determination of the wages, hours, and working conditions up to the employers and employees on a voluntary basis, but if the parties cannot agree and because of such disagreement service to the public will be interrupted, then the wages, hours, and working conditions shall be determined by the state.

Petitioner in effect is arguing that Congress intended to deprive states of their traditional power to regulate public utilities. Obviously Congress has no such power, and furthermore, it had no such intention.

In conclusion we consider it significant to refer to an opinion of the Michigan Supreme Court.

In *Local 170 v. Gadola*, 322 Mich. 332, 34 N.W. 2d 71, the court held unconstitutional a Michigan statute which provided for compulsory arbitration of labor disputes in the public utility industry. The court's decision was based upon the fact the Michigan statute required a circuit judge to act as chairman of the arbitration board. The court held this was unconstitutional because it was an attempt to confer upon a judicial office nonjudicial powers and duties. On motion for rehearing the court held that no other question should be considered as having been decided by the court. It is significant, however, that in its opinion the court alluded to the fact that ten other states had passed similar statutes, and declared:

"The merits of compulsory arbitration over collective bargaining and voluntary arbitration are currently the subject of discussion in legislative halls, university classrooms, and the public press." (p. 74)

\* \* \*

"So compulsory arbitration of labor disputes in the field of public utilities and hospitals may, under the police power to safeguard the public interest, be within constitutional limitations, both federal and state; and certainly so where the facts show a 'clear and present danger' to the public interest."

\* \* \*

"Furthermore, it seems no more logical, within proper limits, to fix wages in public utilities by compulsory arbitration than to fix rates." (p. 75)

\* \* \*

"So considered, there is left but little room for the view that, under Federal constitutional limitations, State legislation substituting even compulsory arbitration for economic 'trial by battle' in the case of public utilities and hospitals constitutes an arbitrary and unreasonable interference with the liberty of the individuals concerned or the property rights of employer and employees."

Legal scholars have arrived at the same conclusions as have been expressed in this brief. Professor Clarence M. Updegraff in his article now being published in 36 Iowa Law Review 61, "Compulsory Settlement of Public Utility Disputes", arrives at the following conclusion:

"It will be recognized that since all public utility properties are owned and operated for purposes which entitle the utility companies to take lands of private owners for their use without violating the 'due process' clause, the utility is in the most complete sense discharging a 'public service.' It is analogous to a branch or department of the state government. Virtually all of the businesses now referred to as public utilities are in one part of the world or another, commonly owned and operated by sovereign states, so that in a very real and correct sense it may be said that the public utilities are to be identified with government agencies for which they are in a sense, substituted. Since they have become monopolies because of their duty, like that of the government, to serve all at reasonable rates, they have reached a point of development where it becomes necessary to sustain their unfailing operation just as government itself is sustained. This is to secure protection of the health, public safety, and general welfare of the population or general public. Indeed, the public health, morals, safety, and general welfare (so zealously guarded by the sovereign police power) would be much more quickly impaired by discontinuance of certain public utility services than

by temporary suspension of many governmental agencies. \* \* \* " (p. 64)

Professor Updegraff further concludes that situation of the public employe is analogous to those performing services "in the Army, Navy, police forces, fire fighting forces, and various other public and quasi-public activities. All the arguments used to sustain the conclusion that strikes against the government may be prohibited operate in the same measure to sustain the contention that strikes against public utilities may be regulated and restricted." (p. 69)

For the foregoing reasons, the decision of the Wisconsin Supreme Court should be affirmed.

*Respectfully submitted*

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BRIEF FOR STATE OF KANSAS AS  
AMICUS CURIAE.

No.s. 329-330

IN THE

S U P R E M E

COURT OF

THE UNITED STATES  
October Term, 1950

AMALGAMATED ASSN. OF STREET,  
RY. AND MOTOR COACH EMPLOYEES  
OF AMERICA, DIV. 998, ET AL.,  
Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS  
BOARD, Appellee.

Filed this.....day of

194.....

Clerk.

By.....

Deputy.

STATE OF KANSAS

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**Nos. 329-330**

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**AMALGAMATED ASSOCIATION OF STREET, RAILWAY AND MOTOR  
COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL.,**

**APPELLANTS,**

**V.**

**WISCONSIN EMPLOYMENT RELATIONS BOARD,**

**APPELLEE.**

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**BRIEF FOR STATE OF KANSAS  
AS AMICUS CURIAE.**

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**HAROLD R. FATZER**  
**ATTORNEY GENERAL FOR KANSAS**

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---

BRIEF FOR STATE OF KANSAS  
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---

HAROLD R. FATZER  
ATTORNEY GENERAL FOR KANSAS

STATEMENT

While the State of Kansas does not have a statute identical with that of Wisconsin, the validity of which is now before the Court in this case, the Legislature of Kansas enacted in 1920 a statute known as the Court of Industrial Relations (General Statutes of Kansas, 1935, 44-601, 44-628, inclusive).



General Statutes of Kansas, 1935, 44-603 describes the several industries which are subject to the provisions of the act. Public utilities are declared to be affected with public interest and subject to the supervision of the state for the purpose of preserving the public peace, protecting the public health, preventing industrial strikes, disorder and waste and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of Kansas and in the promotion of the general welfare.

General Statutes of Kansas, 1935, 44-617 has for its purpose a similar effect as to Sections 111.50 and 111.65 of the Wisconsin Statutes of 1949. Although essential services are not defined in the Kansas Court of Industrial Relations Act, the purpose of the Kansas statute is similar to the purpose of the Wisconsin statute.

Some of the Kansas decisions construing the Court of Industrial Relations Act are: *State ex rel. v. Howat*, 107 Kan. 423, 191 Pac. 585; *State ex rel. v. Howat*, 109 Kan. 376, 198 Pac. 686; *State ex rel. v. Howat*, 109 Kan. 779, 202 Pac. 72; *State v. Dorchy*, 112 Kan. 234, 210 Pac. 352 (reversed: *Dorchy v. Kan.* 264 U.S. 286, 44 S. Ct. 323, 68 L. Ed. 686); *Court of Industrial Relations v. Packing Co.*, 109 Kan. 629, 201 Pac. 418, (Reversed: *Wolf Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S. Ct. 630, 67 L. Ed. 1103); *State v. Howat, et al.* 116 Kan. 412, 227 Pac. 752, (Affirmed: *Dorchy v. Kan.* 272 U.S. 306, 47 S. Ct. 86, 71 L. Ed. 248); *Dorchy v. Kan.* 264 U.S. 286, 44 S. Ct. 323, 68 L. Ed. 686 and *State v. Personett*, 114 Kan. 680, 220 Pac. 520.

The Honorable Clarence S. Beck, Attorney General of Nebraska has heretofore, and pursuant to Rule 27, subsection 9 of the Supreme Court of the United States, filed an amicus curiae brief for the State of Nebraska in the above case.

The State of Kansas hereby adopts the brief of the State of Nebraska and respectfully urges the Court to sustain the validity of the Wisconsin statute, and to affirm the Supreme Court of the State of Wisconsin (257 Wis. 53, 42nd NW 2d 477).

Respectfully submitted,

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STATE CAPITOL  
TOPEKA, KANSAS

Amicus Curiae